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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 ADIDAS AMERICA, INC., an  
4 Oregon corporation;  
and ADIDAS AG, a foreign entity,

5 Plaintiffs,

6 v.

21 Civ. 5615 (JSR)

7 THOM BROWNE, INC., a Delaware  
8 corporation,

9 Defendant.

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10 New York, N.Y.  
11 January 12, 2023  
9:35 a.m.

12 Before:

13 HON. JED S. RAKOFF,

14 District Judge

15 -and a Jury-

16 APPEARANCES

17 KILPATRICK TOWNSEND & STOCKTON LLP  
Attorneys for Plaintiffs

18 BY: R. CHARLES HENN, JR.  
H. FORREST FLEMMING III

19 WOLF GREENFIELD & SACKS, PC  
20 Attorneys for Defendant

21 BY: ROBERT MALDONADO  
HARLEY LEWIN  
22 BRYAN CONLEY  
TONIA SAYOUR

23 ALSO PRESENT:

24 NITA GRAY, adidas paralegal  
MICHAEL PUSTERLA, Thom Browne paralegal

N1CQadil

(Trial continued; jury not present)

THE COURT: So the record should reflect that yesterday my law clerk and I emailed the verdict form to the parties, and plaintiffs had no objection. Defendants had an objection for the record, as they stated, which was overruled. So the verdict form will stand.

I understand that plaintiff has an objection to a demonstrative in defendant's opening. We'll take that up at the next break. And I think we're ready to proceed.

Bring in the jury.

(Jury present)

THE COURT: Good morning, ladies and gentlemen. You are so lucky it's raining out, it's a nasty day, but you get to listen to lawyers.

So let me remind you before we hear closing arguments that nothing that counsel says is evidence. The evidence which is fully before you now came from the witnesses and the exhibits and there were a few stipulations. But it may be very useful to hear what each side thinks the evidence shows. Of course, they're going to disagree but they will be able to bring to your attention arguments and inferences that you may not have otherwise thought about, so it's useful to hear their respective views of the evidence.

Plaintiff has what's called the burden of proof. I'll explain that to you in my instructions later today, but the

N1CQadil

Summation - Mr. Henn

1 result is that the plaintiff begins first, so we'll hear from  
2 plaintiff's counsel.

3 MR. HENN: Good morning. Before we begin, I just  
4 wanted to take a moment to thank all of you for the time and  
5 attention that you have paid over the last ten days listening  
6 to all of these witnesses, and, most of all, listening to the  
7 lawyers droning on. I know it's hard. We know you will  
8 continue to pay attention and to do your job, and both of us  
9 thank you for that. So let's get started.

10 Every trademark case, just like this one, has three  
11 parties who are interested: The plaintiff, here adidas, who  
12 has spent 70 years developing a brand around three stripes; the  
13 defendant, here Thom Browne, who added a stripe, or in the case  
14 of the Grosgrain, took a stripe off and started selling  
15 products that are basically the same; but there's a third party  
16 in interest in this case that I want you to keep in mind as you  
17 deliberate, and that is the public.

18 The purpose of trademark infringement, yes, it's to  
19 protect adidas's trademark. Yes, it's to stop infringers from  
20 doing conduct that's unlawful, but the most important thing is  
21 preventing the public from being confused out in the  
22 marketplace, outside the walls of the courtroom. Keep the  
23 public in the back of your mind as you assess the evidence and  
24 consider whether confusion is likely and whether Thom Browne  
25 should be held liable.

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Summation - Mr. Henn

1           We're going to talk a lot this morning about confusion  
2           and the likelihood of confusion. As I explained to you at the  
3           beginning during my opening statement, confusion and likelihood  
4           of confusion can occur at three different points in time: One  
5           is presale or initial interest confusion and you heard some  
6           testimony about that. The next is point of sale; that's where  
7           you're literally at the register buying the product and you  
8           don't know what you're buying. The third is post sale; that's  
9           after someone who knew what they were buying is wearing the  
10          product, and is out in the public, and is seen by a member of  
11          the public who is then confused about who put out that product.

12           And as we explained at the opening, and as we will say  
13          throughout this closing, adidas is not alleging that someone  
14          walks into Thom Browne's boutique and spends an hour with one  
15          of their customer service people and spends \$3,000 on a  
16          sweatsuit and walks out thinking they have adidas. That's not  
17          what we are alleging. Our allegation is that in the real  
18          world, there are circumstances presale and post sale where  
19          confusion is likely.

20           I told you at the beginning the presales scenarios  
21          where that can occur are where you're sitting on your couch  
22          scrolling through social media and you see something that pops  
23          up that has stripes on it, and you think, oh, that's a neat  
24          adidas product. And you look more closely and you realize, oh,  
25          wait, that's Thom Browne. In that moment you have experienced

N1CQadil

Summation - Mr. Henn

1 presale confusion.

2 The other presale scenario for you to think about is  
3 if you're walking through Nordstrom, a store where both adidas  
4 and Thom Browne sell product, and you're walking through the  
5 aisle, and you see a rack of striped clothes like you see  
6 across the courtroom, and you see it from this distance. You  
7 see those stripes, and the question is, are you likely to be  
8 confused and think, oh, those might be adidas products? We'll  
9 talk more about that later. But that's what presale likelihood  
10 of confusion is.

11 Post sale likelihood of confusion is, again, a  
12 situation where someone is wearing a Thom Browne outfit or,  
13 more likely, is wearing one item of Thom Browne product outside  
14 jogging through Central Park, walking down the street, and who  
15 knows what else they have on. They might have adidas shoes on.  
16 They might not. But the point is out in the world people have  
17 become so accustomed to seeing adidas stripes that when they  
18 see that, a substantial portion of the population is likely to  
19 think, oh, that person is wearing adidas. That's likelihood of  
20 post sale confusion.

21 Two things for you to think about before we go through  
22 the evidence: First, adidas does not have to prove both  
23 presale and post sale likelihood of confusion. Either one  
24 suffices. So if you in your mind think the evidence shows only  
25 presale confusion, Thom Browne is still liable. If you think

N1CQadil

Summation - Mr. Henn

1 the evidence shows only post sale confusion or likelihood of  
2 it, Thom Browne is still liable. It does not have to be both.

3 The other thing I want you to think about is, as the  
4 Judge said, he's going to instruct you on the burden of proof.  
5 This is not a criminal case. Adidas does not have to prove  
6 anything beyond a reasonable doubt as you hear on *Law and*  
7 *Order*. This is a case where the burden of proof is called the  
8 preponderance of the evidence, which is essentially a fancy way  
9 of saying when you consider all the evidence that both sides  
10 presented and you put it on a scale, does it tip towards adidas  
11 or does it tip towards Thom Browne. Any tip towards adidas,  
12 that's liability. 50.1 percent is enough for liability in this  
13 case. That's preponderance of the evidence.

14 So as you are listening to the closings and you're  
15 considering the evidence, I want you to think, where does the  
16 scale tip? Does it tip towards the possibility or the  
17 likelihood that someone is going to be confused or does it  
18 suggest, no, no one is going to be confused by this. All  
19 right?

20 So, how do you go about considering whether there's a  
21 likelihood of confusion? We talked about the factors at the  
22 opening, and I've tried in my closing to organize the evidence  
23 that you heard with regard to each of those factors to help you  
24 process it in the way that makes sense. A note about the  
25 factors. These factors are just things you can consider. They

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Summation - Mr. Henn

1 are things that the Judge will tell you tend to suggest whether  
2 there is a likelihood of confusion or there is not, but it is  
3 not a list of requirements. It's not as though adidas has to  
4 prove every single one of these factors. You might find some  
5 favor Thom Browne. You might some favor adidas. But your job  
6 is to decide overall which way does the scale tip, all right?

7 So what are those factors? How strong is the  
8 Three-Stripe Mark? How similar are the parties' marks to one  
9 another? Do the products compete for the same consumers? Is  
10 there any evidence of actual confusion? Remember, this is a  
11 case about likelihood of confusion so we don't have to show  
12 that people were actually confused, but where there is evidence  
13 of actual confusion, it's pretty good evidence that it's likely  
14 since it actually occurred.

15 Next factor is quality of the products. Are they  
16 similar? And if so, confusion is more likely. The degree of  
17 care when consumers encounter the products. So in the presale  
18 environment, how closely are people paying attention to tags,  
19 prices and labels and how it was manufactured. And in the  
20 post-sale environment, how careful is someone being about what  
21 they're seeing running by them on the street? And the last is  
22 bad faith. We'll talk about bad faith. Bad faith, I like to  
23 tell my team as a plaintiff in a trademark case, it's a nice to  
24 have but not a need to have. In other words, if you find that  
25 Thom Browne acted in bad faith, that tends to show confusion is

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Summation - Mr. Henn

1 likely because he was trying to do something that got closer  
2 and closer to adidas, and that suggests a likelihood of  
3 confusion. But if you find that there's no bad faith, that  
4 doesn't mean confusion isn't likely. It just means he didn't  
5 do it on purpose. Still liable, all right?

6 So let's talk about these factors. First, strength of  
7 the mark. As we said at the beginning, adidas is known for  
8 three stripes. It has been in the business of putting out  
9 product with parallel stripes since the 1950s in this country,  
10 and since Adi Dassler invented the idea of putting an exterior  
11 brand on footwear so that people would know who put out that  
12 product. It's kind of interesting you heard Mr. Browne say  
13 that the reason he wanted to put stripes on his product is that  
14 he learned from Ralph Lauren that you need an exterior badge to  
15 signal where your product comes from. That's exactly what Adi  
16 Dassler figured out in the 1940s, and when he began selling in  
17 the United States in the 1950s, it had the Three-Stripe Mark,  
18 and it's been on the products ever since.

19 The mark is covered by multiple federal trademark  
20 registrations. The United States Patent and Trademark Office  
21 has considered whether the Three-Stripe Mark is protectable  
22 multiple times. You've seen on your screen one example. Every  
23 one of these registrations is depicted in black and white. And  
24 as Ms. Vanderhoff testified, when a registration is depicted in  
25 black and white, it covers all color combinations. It's not



N1CQadil

Summation - Mr. Henn

1 just restricted to black and white. It covers all color  
2 combinations. It's registered on footwear multiple times and  
3 in multiple places. It's registered on apparel in multiple  
4 different placements covering a wide arrange of apparel,  
5 jackets and sweatpants and shirts and shorts and pants and  
6 track tops.

7 It is a federally registered mark. There is no doubt  
8 that adidas owns the Three-Stripe Mark. The Three-Stripe Mark  
9 is so integral to adidas and who it is and its DNA that when it  
10 decided to adopt the trefoil logo in the 1970s, it says, you  
11 know what, we're going to have three leaves and we're going to  
12 run horizontally the Three-Stripe Mark across that trefoil and  
13 it's going to be on every product we sell.

14 In the 1990s when they said, you know what, we want to  
15 separate our Lifestyle product from our Performance product,  
16 they said we need a new Performance logo, the Badge of Sports.  
17 They took the Three-Stripe Mark, they angled it 30 degrees --  
18 there's the three -- they cut the bottom off and they created  
19 the Badge of Sport.

20 When they needed a corporate logo, they took the  
21 Three-Stripe Mark and they ran it horizontally next to the word  
22 adidas. Three stripes permeates adidas. It is one of the  
23 strongest trademarks in the United States, particularly when it  
24 comes to footwear and apparel. Everyone knows adidas when they  
25 see that mark.

N1CQadil

Summation - Mr. Henn

1           Now you're going to be able to consider various types  
2 of evidence as to whether the mark is strong in addition to the  
3 fact that it is registered. One is how long has adidas been  
4 using it? Well, the evidence is uncontested, since 1952. No  
5 challenge to that by Thom Browne.

6           Another type of evidence you can consider as to how  
7 strong a mark is, is how much is this being advertised? Well,  
8 you heard testimony from Chris Murphy about television  
9 advertising, print advertising, online advertising, every  
10 possible type of advertising you can think of to the tune of  
11 \$300 million a year of advertising featuring the Three-Stripe  
12 Mark.

13           Sales is another way you can decide if a mark is  
14 strong because if products are selling well, that suggests the  
15 branding on it is valuable to the consumers who are buying it.  
16 \$3 billion a year adidas sells of just apparel and footwear  
17 with three stripes on it in the United States. That is an  
18 incredibly strong trademark.

19           And you might ask yourself, why is this a factor? Why  
20 does strength of the mark matter in the likelihood of confusion  
21 analysis? Well, the reason is when you have a really strong  
22 trademark, when people see it and they immediately think of the  
23 brand name, that means it's more likely when they see something  
24 that's similar to trigger adidas in their minds because they've  
25 been trained, since 1952 you've been trained when you see those

NlCQadil

Summation - Mr. Henn

1 three parallel stripes, you think adidas. So when you see  
2 something else, you're more likely to be confused. That's why  
3 strength is an important a factor, and it's often why it's the  
4 first factor.

5 Evidence of decades of use. Remember those old  
6 categories people wearing 1970s clothes? We went through that  
7 ad nauseam at the beginning of the trial. You probably thought  
8 we would never stop showing you catalogs, but the reason we did  
9 that was to show how strong the mark is and how long the mark  
10 has been used and how long it has been known to consumers. It  
11 was used back in the Seventies horizontally, vertically, on  
12 shoes, on apparel, and in the red, blue, white combination.

13 We presented an exhibit that walked through horizontal  
14 uses and some diagonal uses over decades. So it is not just  
15 that the adidas Three-Stripe Mark exists in a vertical form.  
16 It is used horizontally, vertically and diagonally, and it  
17 conveys the same impression: When people see that three  
18 stripes, whether it's down the sleeve or around the sleeve or  
19 diagonally on a shoe, they know it's adidas.

20 Red, blue stripe use. You saw tons of evidence of  
21 this as well. As we went through the decades of advertising  
22 and catalogs, we highlighted for you the fact that adidas has  
23 consistently used that combination over a long period of time.  
24 We also went through iconic shoes in history. One of the  
25 reasons the Three-Stripe Mark is so famous is because famous

N1CQadil

Summation - Mr. Henn

1 athletes who have done incredible things did so wearing three  
2 stripes. It dates back to the first track shoes, to cleats  
3 that had screw-in -- the first soccer cleats that had screw-in  
4 cleats. Muhammad Ali wearing three stripes in his world  
5 championship bouts. Dick Fosbury, the high jumper, wearing it  
6 when he jumped over the high jump. The pro model which tons of  
7 ABA athletes wore in the 1970s with the red and blue stripes,  
8 Billie Jean King's shoe. Shoes from, you know, Run-D.M.C.  
9 wrote a whole song about "My Adidas" about the Superstar shoe  
10 which had stripes on it.

11 As I mentioned, the evidence showed substantial sales  
12 of Three-Stripe products to the tune of \$31 billion over the  
13 last ten years, \$3.1 billion a year, tons of advertising of the  
14 marketing of the three stripes and, by the way, advertising of  
15 the three stripes not always in the traditional down-the-sleeve  
16 pattern, but in all sorts of ways. You remember how Chris  
17 Murphy walked you through those ads that we watched, the  
18 television ads and the compilations that were on video, and he  
19 showed you how thoughtful they are about making sure that the  
20 camera zooms in on the stripes during the ad so that you know  
21 the stripes are part of adidas's DNA.

22 We also presented substantial evidence of unsolicited  
23 media attention. Reporters write articles about adidas, and  
24 their editors say don't say adidas every time. Sometimes you  
25 have to refer to them as something else or change it up a

N1CQadil

Summation - Mr. Henn

1 little bit. So you've got references to adidas iconic three  
2 stripes, the trademark Three-Stripe logo, the famous brand with  
3 the three stripes. And I'll note that none of these modify  
4 three stripes by saying, the famous vertical Three-Stripe logo.  
5 They don't do that. It's three stripes no matter what the  
6 orientation. The mark is clearly very strong. There's really  
7 been no evidence to counter anything I just went through from  
8 Thom Browne. That clearly weighs in adidas favor.

9 The second factor is how similar are the marks. And I  
10 put this graphic up here because if similarity of the marks in  
11 trademark infringement were simply a matter of counting  
12 stripes, we wouldn't need a jury. We would just need a  
13 calculator. We would look at it and say, oh, that's four,  
14 that's three, they're not the same. But that's not how it  
15 works. When you're considering the similarity of the marks,  
16 your job is to consider how similar are they when they are  
17 encountered by consumers in the marketplace. So when someone  
18 is scrolling through social media on the couch, how similar is  
19 it when they're going through when you've got four versus  
20 three? When somebody runs by you in Central Park wearing some  
21 of the compression tights that Thom Browne put out, how closely  
22 are you counting stripes? And the fact is four and three are  
23 very similar because, as we're going to discuss in a minute,  
24 there's only one more of them from a distance, moving past,  
25 scrolling past, they're very similar. You can look at these

N1CQadil

Summation - Mr. Henn

1 images. The registered mark is on the left. Thom Browne's  
2 product is on the right. Yes, there's a fourth stripe, but the  
3 law does not require us to show that they're identical. The  
4 Judge will tell you that similarity is the test, not identical.

5 The other thing is negative space. Do you remember  
6 when I was cross-examining Thom Browne, and I pulled the  
7 sweatpants up, and I asked him about negative space, and he  
8 said, yes, it's the space between the stripes. This is one of  
9 the reasons four stripes is a problem because when you add a  
10 fourth stripe, you create the impression of three in between.  
11 You see on your slide how that occurs. When Mr. Maldonado  
12 stands up here in a few minutes with his Thom Browne tie, take  
13 a look at that tie. Tell me do you always see four white  
14 stripes or do you see three gray stripes between the white?  
15 And you might be saying, oh, you're crazy, that's a stretch  
16 man, that's a stretch. But then Ms. Arbuckle got up on the  
17 stand, this person from Fashion Institute of Technology who  
18 knows everything about fashion, and she was presented with this  
19 jacket from Celine, and counsel for Thom Browne asked her how  
20 many stripes do you see? Do you remember what she said? I was  
21 looking at it, I was waiting for her to say three, you know,  
22 three stripes. No, she looked at that, and she said, I see two  
23 black stripes on a white background. She literally gave you on  
24 the stand the evidence of how negative space can influence how  
25 someone sees stripes. So think about that when you're thinking

N1CQadil

Summation - Mr. Henn

1 about how similar these marks are.

2 The shoes are perhaps the closest example of how  
3 similar what Thom Browne has done to the adidas marks. We  
4 talked about the fact that this is not Thom Browne's Grosgrain.  
5 He testified that that is not his Grosgrain. That was a design  
6 choice that he made to create stripes. And it's convenient,  
7 isn't it, that they're basically the same width as adidas  
8 stripes. They are angled sideways just like adidas stripes.  
9 They're in the exact position of adidas stripes on the shoe,  
10 with regard to the red and blue ones. And with regard to the  
11 white ones on the back, again, he said, "That's not my 4-Bars.  
12 That's a design choice. I put the 4-Bars on the side of that  
13 sneaker." Ask yourself why? Why do that? If your brand is  
14 the little tag on the back. If it's the Grosgrain, white, red,  
15 white, blue, white thing, why do that? And why put it on a  
16 white shoe if you want people to know that it's white, red,  
17 white, blue, white? Curious.

18 The other Grosgrain products are also incredibly  
19 similar to the marks that are registered by adidas: Same  
20 placement, same impression, shorts, pants, et cetera. So when  
21 you are considering how similar the marks are, yes, one is  
22 three, one is four, or one is three and one is two, but on  
23 balance, in the context of presale and the context of post  
24 sale, they are incredibly similar. Hence, likely confusion.

25 So the next one is do the products compete for the

N1CQadil

Summation - Mr. Henn

1 same consumers? Well, there are a lot of different ways you  
2 can look at this factor. The first is, are the parties selling  
3 the same products? Well, there are different price points for  
4 different products, for sure. But ask yourself, the last time  
5 you were scrolling through Instagram, how many times did you  
6 see a price tag on the products before you started clicking  
7 through? Or when you were walking through the store and you  
8 saw products hanging on a rack way over there, did you know  
9 what the price was? No, you just knew that that was a cardigan  
10 and a suit. So the product categories are the same, and why  
11 that's relevant in this kind of case is when someone is running  
12 by you in Central Park, and they're wearing 4-Bar compression  
13 products, it is more likely that you will be confused if adidas  
14 also sells compression products, right? You can consider if  
15 adidas didn't sell any compression products, then it would be  
16 very odd for you to see that and think adidas. But because  
17 they sell exactly the same types of products, confusion is more  
18 likely, and the record is very clear on this.

19 You probably are again wondering why it was taking so  
20 long when we went through with Paul Bowyer, we went through  
21 different categories. There are specific exhibits, an exhibit  
22 of compression and running, an exhibit of sweatpants, an  
23 exhibit of shorts, an exhibit of T-shirts, an exhibit of polo  
24 shirts, sweat jackets and hoodies and outerwear and puffy  
25 jackets and, of course, shoes. So the types of products that



N1CQadil

Summation - Mr. Henn

1 are likely to be encountered in the marketplace are essentially  
2 the same.

3 What about the other products? Thom Browne has spent  
4 a lot of time during this trial putting in front of you  
5 examples of products that adidas doesn't accuse of  
6 infringement: Suits, the shrunken suit, cardigans, cashmere  
7 sweaters. When you are back making your deliberations, focus  
8 on what is actually being accused of infringement in this case.  
9 It is not these products. It is the products that are exactly  
10 the same kind that adidas sells. And adidas was thoughtful  
11 about that. We did not say Thom Browne must stop all four  
12 stripes on everything that it does. Because we are bound by  
13 the law that says we can only object to things that are likely  
14 to cause confusion. So we focused our claims on the products  
15 in Exhibits 55 and 56. Those are the products that adidas  
16 alleges to infringe. Not this other stuff. Not the stuff on  
17 the runways.

18 How else do we know that these parties are competing  
19 for the same consumers? One way we know is they're in the same  
20 stores. Lots of testimony from both sides about the fact  
21 they're in Saks, they're in Bergdorf, they're in Nordstrom's.  
22 If you're walking through one of those stores, you are likely  
23 to encounter both products at some point in your shopping trip,  
24 and that increases the likelihood of confusion. Because if  
25 you're walking through Nordstrom and you see stripes, do you

N1CQadil

Summation - Mr. Henn

1 know if it's Thom Browne or adidas from a distance? Probably  
2 not.

3 FARFETCH and Net-A-Porter. Those are online sites  
4 where they also overlap. So if you are scrolling through What  
5 FARFETCH has to offer, you might encounter both. Yes, once you  
6 click through and you see at the top it says Thom Browne and  
7 you see it's \$2,000 for something, yes, yes, you realize that  
8 that's a Thom Browne product, but that's point-of-sale  
9 confusion. You've already clicked through, and that is presale  
10 confusion, and that is just as unlawful as what happens at the  
11 register.

12 **We also know that presale confusion is possible**  
13 **because both parties are very active on social media. You**  
14 **heard testimony from Chris Murphy about this. You saw plenty**  
15 **of examples with Rodrigo Bazan and Thom Browne where there were**  
16 **Facebook posts and Instagram posts and that is exactly how it's**  
17 **possible that people will scroll past these things in their**  
18 **feed. You also heard about adidas doing paid advertising so**  
19 **that even if you don't follow an adidas account, you are**  
20 **exposed to those three stripes all the time.**

21 How else do we know they're pursuing the same types of  
22 consumers? Well, we talked a lot about Leo Messi. You didn't  
23 know him before; you now know who he is. He has been an adidas  
24 athlete, as we know, for well over a decade. And Thom Browne  
25 did a deal with them in 2018. We're going to talk about the

N1CQadil

Summation - Mr. Henn

1 suspicious timing of that in a minute when we get to the bad  
2 faith factor. But as we think about whether we are approaching  
3 the same consumers, do you remember what Mr. Browne testified  
4 on cross about this? His testimony was: I did that because I  
5 wanted to reach customers that we hadn't reached before. I  
6 wanted to reach a new type of consumer; not the niche  
7 consumer -- you remember the exhibit where they said they were  
8 a niche brand that was not known outside of their little area?  
9 Part of that effort was to go out into the world of sports and  
10 try and reach new people. Who were they trying to reach? They  
11 were trying to reach consumers like adidas who are interested  
12 in Lionel Messi and other soccer players. So, again, there was  
13 lots of testimony from Chris Murphy and Paul Bowyer about how  
14 focused adidas is in advertising, marketing and selling to  
15 soccer fans. And Thom Browne didn't just do a one-time deal.  
16 We saw the contract: Three-year deal with Barcelona,  
17 conveniently after adidas objected to the use of the 4-Bars.

18 Basketball too. LeBron is a fan. LeBron wears Thom  
19 Browne apparel. They went out in 2018 four months after adidas  
20 objected, or a couple of months after adidas objected, and  
21 outfitted the whole Cavaliers team. Well, why were they doing  
22 that? Again, to reach new audiences with their product.  
23 Basketball, where adidas has had a long-term presence and a  
24 huge focus, you heard testimony from Chris Murphy and Paul  
25 Bowyer about the importance of basketball as a category, the

N1CQadil

Summation - Mr. Henn

1 importance of dressing athletes in three stripes, and you saw  
2 tons of advertising like you see here on this slide. That's an  
3 example of competing for the same consumer.

4 The next one is evidence of actual confusion. Now,  
5 actual confusion, it's another one of those nice to have, not  
6 need to have. The Judge is going to tell you that adidas has  
7 no obligation to present you with evidence of actual confusion  
8 because that's not the test. It's whether confusion is likely  
9 to occur, not whether it has actually occurred. But in a case  
10 where there is an actual confusion, that tells you it's likely.  
11 So there are two categories of actual confusion evidence that  
12 you heard in this case. One is consumers who in that presale  
13 environment scrolling through their Instagram or feeds came  
14 across a Thom Browne product. And, yes, one guy bothered to  
15 literally type in "adidas" but think of all the people who saw  
16 that and didn't think, oh, well, I should alert Thom Browne to  
17 the fact that I think this is adidas and let me take a moment  
18 and type adidas in there. This is the tip of the iceberg,  
19 someone who took the time to express their confusion in  
20 writing.

21 And think about how rare it would be for someone to  
22 document actual confusion in the presale or post-sale  
23 environment. You know if you're confused when you buy  
24 something, you get home and you think, oh, my gosh, it's not  
25 adidas. You return it to the store, and there's a very clear

N1CQadil

Summation - Mr. Henn

1 documentation, I was confused, hence, I returned it. But in  
2 the presale and post-sale environment, it's very difficult to  
3 find actual confusion. There's not a 1-800 I was confused and  
4 you dial in and you say, "I saw Thom Browne and I was  
5 confused." But here, we actually have people who took the time  
6 to express their confusion. In Instagram posts both with  
7 regard to the 4-Bars and with regard to the Grosgrain, "I  
8 thought it was adidas." Even using @adidas, tagging the  
9 company.

10 The other evidence of actual confusion in this case is  
11 the survey. So you're sitting there thinking, all right, I'm a  
12 juror, I've got to decide all of this evidence. What is the  
13 best evidence of what consumers think when they see these  
14 products? The best evidence is a study that shows the products  
15 to consumers and asks, what do you think? Who puts this out?  
16 Well, Hal Poret conducted a survey of 2,400 people, men and  
17 women across the United States, people who were likely to buy  
18 these types of products, so the very consumers that you are  
19 supposed to be assessing whether there's a likelihood of  
20 confusion for.

21 He asked them two key questions. The first was what  
22 company or brand do you believe makes or puts out this product?  
23 Makes or puts out. That is an assessment of are people  
24 confused about the source of these products. Do you think  
25 adidas actually made this product? He also asked do you think

N1CQadil

Summation - Mr. Henn

1 the product we showed you is affiliated with, sponsored or  
2 approved by adidas? And when the Judge gives you the  
3 instructions later, you will see that that is important  
4 evidence. If, in fact, consumers are likely to believe that  
5 the product is affiliated with, sponsored by, or approved by  
6 adidas, Thom Browne is liable. Hal Poret asked the same  
7 questions that you are being asked to resolve.

8 And what were the results? The results were  
9 significant, as Mr. Poret told you. You might look at this and  
10 say, well, 26 percent of people were confused. What about the  
11 other 74 percent? Yes, we're not saying everyone in America is  
12 going to be confused. But think about 26 percent of the  
13 population and what that number looks like. 26 percent of  
14 people in New York walking down the street. 26 percent of  
15 people thinking that that is adidas. And, keep in mind, that's  
16 after controlling for the noise created by just these look like  
17 athletic products. The control caught that. So we know the  
18 only difference in these images is Thom Browne's use of the  
19 4-Bar mark. And 26 percent of people seeing the jacket, and  
20 the compression pants were confused. 38.6 percent were  
21 confused by that top. Almost 25 percent were confused by the  
22 running shorts and the jacket. This is empirical data that you  
23 have to base your decision on. With regard to men's product,  
24 35 percent were confused by the T-shirt and the gray  
25 sweatpants. 31 percent by the shorts. 30 percent by the

N1CQadil

Summation - Mr. Henn

1 jacket. 15 percent by the sweatpants by themselves. And the  
2 shoes 14 percent.

3 Mr. Poret gave you quantitative proven data that the  
4 consumers at issue are confused. What did Thom Browne give you  
5 in response? Nothing. Nothing. There is not a survey from  
6 Thom Browne in this case. There is no one who came and sat in  
7 that chair and said, I did a study, and guess what? Confusion  
8 is not likely. Just an empty chair. No response to Hal  
9 Poret's survey.

10 Now, they brought Dr. Steckel in. He's a great guy,  
11 but he didn't offer any opinions regarding Hal Poret's survey  
12 or any other matter in the case for that matter, but he did not  
13 respond to Hal Poret's survey. We have no response in the  
14 record, so when you are weighing the evidence, there is nothing  
15 to counterbalance that in the record.

16 What do we have? We have the cross-examination of  
17 Mr. Poret. And what did the cross-examination focus on? It  
18 was, well, Mr. Poret, you used pictures with a white  
19 background. Okay. Let's just pause and think about that for a  
20 minute. First of all, he testified the reason he did that was  
21 so that consumers would focus on the product, so they had every  
22 opportunity to see the stripes, count the stripes without any  
23 distractions that would actually exist in the world real. The  
24 second thing he said is putting a tree in the background or a  
25 bus in the background does not reduce the level of confusion.

N1CQadil

Summation - Mr. Henn

1 If anything, that would mean people are paying less attention  
2 to the clothing because they're distracted by everything else  
3 going on around them. Confusion goes up. The third thing he  
4 said about that criticism was perhaps important from a science  
5 standpoint, he said adidas is not alleging that trees are like  
6 likely to cause confusion. So I would have had to put that in  
7 the background of the control as well. So it would have netted  
8 out. So by using the white background, he ensured the most  
9 valid result. And overall 26.9 percent of the public is  
10 confused by Thom Browne's products. Remember, the third party  
11 in interest in this case. It's these people, the public.

12 The next factor is quality of the parties' products.  
13 First of all, both parties sell perfectly high-quality goods.  
14 Not only did you hear testimony from adidas from Paul Bowyer  
15 about the controls at the factory and the wear testing and the  
16 performance testing and all the things adidas goes through to  
17 make sure its products are the highest quality and actually  
18 help perform on court or on the field, but you also heard  
19 testimony about these collaborations where adidas does these  
20 high-end collaborations with Yohji Yamamoto and Stella  
21 McCartney, Danielle Cathari and Prada and Gucci. So to the  
22 extent you had some concern about the fact that Thom Browne's  
23 products are made in Italy from the finest fabrics and are  
24 woven in a very special way, the quality is essentially the  
25 same.



N1CQadil

Summation - Mr. Henn

1           The other thing to think about while you're assessing  
2           quality is context. Remember, if you were buying one of these  
3           things, you might pick them up and check the manufacturer, you  
4           might check price, you might see how it's woven and what the  
5           fabric is. If you're in the presale context, you're too far  
6           away to touch the product, to know how it's manufactured, to  
7           know what it's made of. And in the post-sale scenario, unless  
8           you are a really creepy person, if you see somebody on the  
9           subway, you're not going to know what the fabric feels like or  
10          what it's made of because you're not going to go over and start  
11          touching the person. So you will need to assess quality in the  
12          context in which you are assessing likelihood of confusion.  
13          And so visually the quality is essentially the same.

14           A moment about the rack, the rack that's been sitting  
15          over there for you to look at. A couple things for you to  
16          think about the rack: First, can you tell the price of  
17          anything on that rack? Nope. In fact, do you remember when  
18          counsel took one of the products up to Thom Browne and asked  
19          him what the price was, and he started looking all over for a  
20          price tag and couldn't find a price tag, and said, oh, it's  
21          about a thousand bucks? He couldn't tell the price holding his  
22          own product. Ask yourself in the post-sale scenario, do you  
23          know what the price of these product are? Fabric? This one is  
24          made of cashmere, so of course it's totally different from  
25          adidas and no one would know. You can't tell that's cashmere

N1CQadil

Summation - Mr. Henn

1 from over here. Who knows what those are made of?

2 How they are manufactured. Are the stripes woven in  
3 or stitched on? Really? Is that what people are focused on  
4 when they're seeing people walk by them? Or when you're  
5 looking across there, can you really tell how those are woven  
6 into the product? You are looking at product in the exact kind  
7 of way that someone in the presale or post-sale environment  
8 would -- from a distance. You also can't, by the way, read the  
9 little labels and see that in tiny, tiny print it says "Thom  
10 Browne." So that's not helping anyone avoid confusion.

11 So what was on that rack? This is a good example  
12 where they filled this rack with a bunch of products adidas is  
13 not alleging infringed its mark because the products are so  
14 different. Adidas is limiting its claims to things that look  
15 like adidas products: Sweatpants, hoodies, sweatshirts, right?  
16 Take everything off the rack that we're not accusing, and it's  
17 a skinny, little rack.

18 The other thing to think about, what's not on that  
19 rack? What did Thom Browne not want you to look at in this  
20 courtroom? There is not one piece of their running compression  
21 apparel on that rack. There is not a single shoe over there.  
22 You think that was by accident? They didn't want you to see  
23 that stuff from this kind of distance because they knew the  
24 impact would be, oh, my gosh, from over there, that looks like  
25 adidas.

N1CQadil

Summation - Mr. Henn

1           The other thing I want to say about quality, Thom  
2 Browne clearly makes very expensive clothes, and they are --  
3 you know, reminds me of the old ads of Corinthian leather, but  
4 they are products made with the finest cashmere from Corgi and  
5 Wales. We are not disputing that, but, very interestingly, the  
6 products we actually accuse are the products that Thom Browne  
7 calls things like running shoes, and tech compression tights.  
8 And when we asked, are these actual running shoes? It might  
9 have been my favorite line in the whole trial. Thom Browne  
10 said, "I would advise not running in my running shoes." Think  
11 about that for a minute. "I would advise not running in my  
12 running shoes."

13           And when asked whether they did any product testing or  
14 wear testing on these purported running outfits, the answer  
15 was, oh, no, no, no, no. And when we asked about their  
16 swimwear, do you remember that one? Are these actually for  
17 swimming? The answer: Well, you can swim in it. Reminds me  
18 of going to a wedding, getting dunked in a pool. You can get  
19 wet in these things, but they are not made for this purpose.

20           The next factor, the degree of care when you are  
21 encountering the product. I've covered this a little bit as  
22 I've talked about the other factors because, again, as you  
23 assess the evidence, on each of these you need to be very  
24 cognizant where in that purchase journey the likelihood of  
25 confusion is happening. When you think about the degree of

N1CQadil

Summation - Mr. Henn

1 care that consumers are exercising, be thinking about the two  
2 places that adidas is alleging likelihood of confusion:  
3 Presale and post sale.

4 So what is some evidence that is not relevant to your  
5 consideration? Price. Presale. Post sale. Nobody knows the  
6 price. Fabric. Presale. Post sale. You don't know the  
7 fabric. You don't know the manufacturing. You don't have  
8 someone giving you careful client care and sitting with you and  
9 serving you tea and all of the things that happened in the  
10 store. None of that is relevant. With regard to where we are  
11 alleging likelihood of confusion and where you need to assess  
12 is confusion likely, the degree of care is way less. It's just  
13 the nature of life. When you walk from the car or the subway  
14 or from your place to the court, you are not sitting there  
15 touching the people that walk by and asking them what it cost  
16 and where it was manufactured. That's just not the way things  
17 happen in the post-sale world.

18 Why is the degree of care such an important issue for  
19 you in this case? Well, it's because once the products leave  
20 Thom Browne's store, the consumer can wear it however they  
21 want. I asked Mr. Bazan, any restrictions you put on anyone  
22 once they buy these products? Nope. They can wear it wherever  
23 and however they want. We have evidence in the record that  
24 people wear it with adidas shoes and socks. We're not saying  
25 that happens all the time, but we're giving it as an example

N1CQadil

Summation - Mr. Henn

1 that that is a very realistic possibility of what could happen  
2 in the world. And if you thought this stuff looked confusing  
3 like adidas before they wore it with adidas shoes, you can  
4 image what it might look like somebody running by you wearing  
5 adidas shoes and these striped outfits. You might think, oh,  
6 they have a lot of adidas on.

7 The picture on your left, the guy with his knee up in  
8 the air? That was posted out by Thom Browne's company to the  
9 public. That was on their own social media feed, like, hey,  
10 here's our stripes and wearing it with adidas socks. We showed  
11 you this ad, mostly because I thought it was a nice break in an  
12 otherwise mundane day, but this is a good example of what  
13 happens. People buy Thom Browne's products, and then they can  
14 do with it whatever they want and go wherever they want with  
15 it. People can end up in gyms. Celebrities can end up in ads.  
16 And, yes, it's funny. He's obviously not working out. He's  
17 drinking milk out of a sippy cup. Yes, it's funny, but the  
18 idea is they're placing this in the context of sport, adidas's  
19 core area. And that's why in that wholesale world,  
20 possibilities for confusion are much greater than at the  
21 register.

22 We also know that because of how people wear clothes  
23 and move about the world, the four stripes are not always going  
24 to be visible. Even on Thom Browne's own website, he's got  
25 models bunching up the shorts so you can't see all four stripes

N1CQadil

Summation - Mr. Henn

1 clearly. I don't think it was done intentionally, but it's a  
2 perfect example of how someone can be confused in the public.  
3 Even if someone has four stripes, they are not always visible.  
4 It's why just slapping a fourth stripe on wasn't the answer.

5 The products in the middle, remember I showed those to  
6 Mr. Bazan, and I asked about the leggings on the guy. I said,  
7 he's got your leggings on there, and the shorts are covering up  
8 or his hand is covering some of the stripes, so you can only  
9 see a couple of them, you can only see three stripes on the  
10 shorts and on the leggings. His answer was to sort of deviate  
11 and say, oh, but you see the four stripes on the top. What's  
12 to say the person wearing the tights and the shorts out in the  
13 park is also wearing a Thom Browne top? They might just be  
14 wearing a black top. They might be wearing an adidas top. The  
15 fact is you cannot ensure that consumers in the post-sale world  
16 will always see all four stripes, and that's why four doesn't  
17 solve the problem.

18 How else do we know that even when people are  
19 presented with this, the degree of care doesn't prevent  
20 confusion? Because we have the survey results. We talked  
21 about the overall percentages, but I think equally important is  
22 the verbatim responses. When people saw these striped designs  
23 and repeatedly said, "I saw three stripes, three stripes, three  
24 stripes, three stripes." Even though there's clearly four  
25 white stripes there. It begs the question, are they looking at

N1CQadil

Summation - Mr. Henn

1 from the negative space like Ms. Arbuckle? Or is this an  
2 example of that Gestalt theory you heard Dr. Joachimsthaler  
3 talk about where people don't sit down and count stripes, but  
4 they get an impression based on their memory, adidas being  
5 stripes? It doesn't matter which one is happening. You don't  
6 have to resolve that psychological conundrum. You just need to  
7 know that the empirical data from a survey to which there was  
8 no rebuttal proves people thought it was adidas and saw three  
9 stripes.

10 The same was true with the male products: Three  
11 stripes, three stripes, three stripes. Same was true with  
12 shoes: Three stripes, three stripes. And think about these  
13 are people who are sitting down with no distractions on their  
14 computer screen taking a survey, looking at the product for 15  
15 seconds minimum, and then being asked immediately who puts this  
16 out and why? Think of the degree of care they're engaged in at  
17 that moment versus somebody on the street. Likely to be even  
18 higher in those scenarios.

19 The Judge asked the witness a question, which I  
20 thought was a good one, he asked Dr. Joachimsthaler, "Well,  
21 what if people had problems with their eyesight when they took  
22 the survey?" Well, two things. Dr. Joachimsthaler explained,  
23 yeah, and people out in the real world, they have problems with  
24 their eyesight, so guess what? You're going to have people who  
25 don't see it clearly. But Mr. Poret also explained in his

N1CQadil

Summation - Mr. Henn

1 survey, not only were respondents required to put on their  
2 contact lenses or eyeglasses but after they saw the question  
3 and before they answered the question about source confusion  
4 and affiliation, they had to say, "I was able to view the  
5 images clearly." There is no worry that in the survey people  
6 weren't seeing what they were needing to see.

7 Another point on degree of care. This might be my  
8 second favorite quote from Thom Browne during the trial while  
9 he was on the stand. You remember when he was shown these  
10 drawings offings early playing around with Three-Stripe band on  
11 the sleeve? As counsel said to him, how many stripes are on  
12 that sleeve? Mr. Browne said, "Four."

13 (Continued on next page)  
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NlCsADI2

Summation - Mr. Henn

1 MR. HENN: There was sort of an awkward pause. And  
2 all of a sudden he said, Oh, oh, wait, three.

3 Now, clearly that was a mistake. But guess what?  
4 That's what happens in the real world, and you saw it here on  
5 the stand from the man who drew the pictures himself.  
6 Sometimes three looks like four. Sometimes you, guess what,  
7 get confused, even when you're sitting on a stand under oath  
8 and paying very careful attention. You can imagine what it's  
9 like out in the world.

10 The last factor on likelihood of confusion is bad  
11 faith. Again, if there is evidence of bad faith, it tends to  
12 show confusion is more likely. But if you think, you know  
13 what, Thom Browne didn't do anything wrong. He just made a  
14 mistake. It's all right. He's still liable because confusion  
15 is likely.

16 Let's talk about the evidence of bad faith. So we all  
17 know back in 2007, adidas called and said, Hey, stop doing  
18 three stripes. And Mr. Becker said, We'll do it. We're about  
19 to go bankrupt. We don't need to fight. Hung up the phone.

20 We also know that Thom Browne's lawyers promptly  
21 provided them with a full report, 40-something pages, of all of  
22 adidas' trademark registrations and said to him, By the way,  
23 that those covered mark vertically, horizontally, and  
24 diagonally. And that was in 2007 the company's CEO was on  
25 notice of adidas' trademark rights.

NlCsADI2

Summation - Mr. Henn

1           So a few months later Thom Browne and his design team  
2 get together and they think, All right, can't do three. What  
3 do we do? I've got it. We'll do four. We'll put another  
4 stripe on top. Do they call the lawyers that just told them  
5 adidas owned all these rights? Did they ask, Hey, is four an  
6 infringement? Hey, if I put a fourth stripe on it, am I good  
7 legally? No.

8           You heard Mr. Becker. It might have been the last  
9 answer he gave on the stand. I asked him: Did you give an  
10 opinion as to whether this was OK? He said, We didn't get any  
11 opinions from them. So instead of checking with the lawyers,  
12 Thom Browne starts slowly rolling four-stripe products out.

13           Now he's doing a lot of non-four-stripe products. We  
14 looked at a lot of fashion show pictures. All kinds of very  
15 creative, very artistic, very unusual products. None of which  
16 are accused of infringement. He also started putting the four  
17 stripes on cardigan sweaters. Not accused of infringement. He  
18 ultimately added the four stripes to the shrunken suits. Not  
19 accused of infringement.

20           Then there was sweat pant created, but it was a tiny,  
21 tiny situation. You remember those invoices that one of the  
22 last witnesses went through where my colleague Bethany asked  
23 him to go through and find the highlighting somewhere in the  
24 invoice? Well, if you want to spend some quality time, you can  
25 go through those invoices yourself. We did some math for you.

NlCsADI2

Summation - Mr. Henn

1 Over a two-year period, Thom Browne told 374  
2 sweatpants. So it was a tiny thing, tiny thing back then. And  
3 then starting in 2016 the company decided, you know what, let's  
4 expand this. Let's get into sportswear bigtime. Our key  
5 growth pillars are sportswear. Because right now we're just a  
6 niche brand. We have low awareness. It's just customers  
7 within that tight fashion circle that really like Mr. Browne.

8 So guess what? Sportswear segment greatly expands in  
9 2017, 2018. It's a business priority to go down the path of  
10 selling more of this sportswear. Adidas calls in 2018 and  
11 says, Hey, woah, we're seeing infringing product. What are you  
12 doing? This is new stuff. You're putting it on shoes. You're  
13 running it down the legs of pants. You're starting to sell  
14 products that look like our products. That's not suits. We  
15 didn't have a problem with the suits. So there was a call in  
16 2018; stop doing this.

17 This is where bad faith gets really obvious. After  
18 that call that put them on notice of adidas' rights and adidas'  
19 objection, after that call they do the deal with Barcelona.  
20 They do the deal with the Cavs. After that call, two years  
21 later in 2020 they decide, you know what, let's release an  
22 entire line of compression athletic products. And they told  
23 Vogue magazine, this is the first for the brand. And  
24 Mr. Browne testified, prior to this point, they hadn't sold any  
25 legitimate athletic product. Two years after adidas objects.

NlCsADI2

Summation - Mr. Henn

1 That's not good faith. That's bad faith.

2 What else did they do that exhibits bad faith? Well,  
3 they put all these products on a new section of their website  
4 called active-wear. And you remember when the judge asked  
5 about the definition of sportswear versus active-wear, and  
6 Mr. Browne said active-wear, that's for athletics. That's for  
7 sports. That's where they put these products that we accuse.

8 What else did they do? They started calling these  
9 things running shoes, tech products, ski jackets. They started  
10 using the language of sport to promote these products. This is  
11 bad faith. When you go from a shrunken suit to a tiny handful  
12 of sweatpants to full-on compression products that you promote  
13 online with models wearing adidas shoes.

14 Same thing with the Grosgrain. Adidas doesn't say  
15 it's a problem to put it on the back of a business suit or tuck  
16 it inside the placket or on the buttons on your sleeve. That  
17 is not going to cause confusion. But when you turn it on an  
18 angle and you blow it up and you put it on a white shoe, that  
19 is bad faith. Running that two-stripe design down the side of  
20 a pant or in the classic position down a jacket, that is bad  
21 faith.

22 And you might pause and think, Oh, well, but that's  
23 his trademark. He should be able to do it. He did apply to  
24 register that little flag, so he can stretch it out if he wants  
25 to. So I asked Mr. Browne. I said, Hey, is this your

NlCsADI2

Summation - Mr. Henn

1 trademark, this stuff? Remember what he said? He said no,  
2 that's just a design choice. I chose to do that. I chose to  
3 do it. Didn't have to. That's bad faith, when someone does  
4 that in the face of an objection from a trademark owner of one  
5 of the most famous brands in the country.

6 And what a good deal it has been for them. Remember  
7 their damages expert putting this up on the slide? Back in  
8 2015, couple hundred thousand dollars of this stuff. Up to  
9 \$4 million in 2021, last full year in this data. He's only  
10 gone through November of 2022. It's small. That's bad faith,  
11 going at it, doing more, selling more, selling more.

12 Do you remember in the opening when Mr. Maldonado said  
13 this case is about property lines, and adidas needs to stay on  
14 its property. I want you to think about that analogy when you  
15 think about bad faith. So Thom Browne sells all these things  
16 that adidas doesn't accuse. They are not active-wear. They  
17 are not sports, even though he calls them sportswear. Use your  
18 common sense on that. These are not the things that adidas  
19 objects to now or ever objected to. We don't have an issue  
20 with these. What adidas objected to and what is bad faith is  
21 when Thom Browne moved on to adidas' property with sports  
22 products, athletic products, running shoes that he wouldn't  
23 advise you to run in but is still calling them running shoes.

24 And you are likely to hear a bit of an emotional plea  
25 from my opposing counsel about adidas is trying to stop us from

NlCsADI2

Summation - Mr. Henn

1 doing everything. This brand means so much to us. Don't make  
2 us stop. I want to put in context what adidas is objecting to  
3 in light of the overall Thom Browne business. We heard they  
4 are a \$300 million business, globally a \$300 million business.  
5 You saw data from the last witness that, in the U.S. during the  
6 last six years or so, they sold \$120 million of product  
7 totally. The accused products, according to their expert, were  
8 12 million. So adidas is only objecting to 10 percent of what  
9 Thom Browne did.

10 It's worth thinking about. If 90 percent of your  
11 product is outside of anything adidas cares about, why go on  
12 their front lawn. You're like, oh, man, get off my lawn. Why  
13 do that? You don't need that. And more importantly, why do it  
14 with four stripes? He sells tons of products -- it's in  
15 evidence -- tons of products with no four bars on them. If you  
16 look at the exhibits that are his current website, a portion  
17 has the four bars. He very easily could have started selling  
18 compression products and running shoes and running shorts  
19 without any objection to adidas if he had simply done it  
20 without four bars on it, which would have brought that  
21 10 percent number down to essentially nil.

22 Remember, they have done no market research, despite  
23 the board of directors, they didn't do market research to see  
24 if there is any brand awareness of the four bars, whether  
25 anyone actually buys products because of the four bars. There

NlCsADI2

Summation - Mr. Henn

1 is no evidence that it does anything for their business, and  
2 yet they went right into adidas' own court.

3 What else did they do that was in bad faith? How  
4 about this one? Thom Browne sponsors a football game, not just  
5 in the backyard among friends, where he's going to get them out  
6 in his sweat suits. He invites *Vogue* magazine to attend for a  
7 photo op, and he puts them all in adidas shoes. That's bad  
8 faith, people. That's bad faith.

9 I also thought it was interesting. I asked Mr. Bazan,  
10 who put out those shoes, and he could tell me adidas, even  
11 though he couldn't read the word adidas. He saw the stripes.  
12 He knew adidas.

13 What else is bad faith? How about the Facebook post  
14 where they not only put a model on a track that's wearing  
15 products that they suggest aren't really for running, and then  
16 put them in adidas shoes and adidas sunglasses, and posted that  
17 out to Facebook. That's bad faith.

18 And you're not really having to answer a separate  
19 question in the verdict form about bad faith. The reason  
20 you're considering bad faith is, is he doing things that are  
21 going to make confusion more likely? This is a good example of  
22 that. When you push out media that combines Thom Browne  
23 products with adidas products, you are doing things -- you can  
24 call it bad faith -- but really you're just doing things that  
25 make confusion more likely.

NlCsADI2

Summation - Mr. Henn

1           Last point on bad faith I'll point out. Thom Browne  
2           is not some naive, in the woods, knows nothing about  
3           intellectual property and stumbled onto adidas' front lawn.  
4           You heard testimony from Mr. Bazan that Thom Browne values its  
5           trademarks and has gone after Rossignol and Moncler and Tommy  
6           Hilfiger and Zara. And I didn't put the last one on because it  
7           was funny. And you also heard that the Rossignol complaint  
8           they raised was particularly out to this case because Thom  
9           Browne claims its Grosgrain is five stripes -- white/blue/  
10          white/red/white. He testified we went after Rossignol for  
11          using three stripes.

12           They know that just taking a stripe away or adding a  
13          stripe doesn't prevent confusion. So they did all of that  
14          behavior I just went through knowing full well that the simple  
15          difference in the number of stripes doesn't make a difference.  
16          They knew what they were doing.

17           So the Three-Stripe Mark is a very strong, famous  
18          mark. The marks are similar in the context in which you are  
19          assessing likelihood of confusion. The products clearly  
20          compete for the same consumers. There is survey evidence,  
21          there is evidence of actual consumer confusion online. The  
22          products are sufficiently similar in quality. And if anything,  
23          the sports products being put out by Thom Browne are not up to  
24          par when it comes to performance. There is a very low degree  
25          of care by consumers in these contexts pre-sale and post-sale,



N1CsADI2

Summation - Mr. Henn

1 and there is substantial evidence of bad faith.

2 So what do you do with that? First question you're  
3 going to be asked is: Do you find Thom Browne liable? We go  
4 back to my shared services. It doesn't have to be beyond a  
5 reasonable doubt. The question is, is it more likely than not,  
6 just that much, is it more likely than not that people are  
7 going to be confused. A survey proves it, and the rest of this  
8 evidence helps support why that is happening. So you check  
9 liable.

10 All right. The next thing you're going to be asked is  
11 what do you award? Well, money. The first step is to look at  
12 the evidence you have in the record of how this harms adidas.  
13 We spent a lot of time with the first few witnesses talking  
14 about how important adidas' brand is to its business, how core  
15 it is, that it is the most valuable asset of the company. And  
16 then you heard testimony from Mr. Murphy, Dr. Joachimsthaler,  
17 about how confusion in the marketplace and dilution, which  
18 we'll talk about in a minute, harms a brand. And the way it  
19 does is you spent all of this time creating an image, an  
20 impression in people's minds of certain attributes associated  
21 with your brand, but when they encounter it in a different  
22 context, it undermines those efforts. It causes the mark to be  
23 less differentiated.

24 I said to Thom Browne on the stand, Are you aware of  
25 any other companies using three stripes as a brand? No. Are

NlCsADI2

Summation - Mr. Henn

1 you aware of any other companies using four stripes as a brand?  
2 No. Well, when you add a confusing brand, one that consumers  
3 think is three stripes, we know from the survey data that  
4 causes that Three-Stripe Mark to lose its differentiation in  
5 the marketplace. It becomes less unique in the minds of  
6 consumers. That was the testimony from Dr. Joachimsthaler. It  
7 weakens those brand associations that people have that adidas  
8 has spent all that time building.

9 It creates shared associations. And we're going to  
10 talk about that which we talk about those memory networks in a  
11 minute. That when those are disconnected, it hurts the brand.  
12 It drives up the cost of marketing because you're going to have  
13 to overcome the impact of that confusion. Also, the testimony  
14 from Dr. Joachimsthaler that it reduces consumer loyalty.

15 Now, Dr. Joachimsthaler admitted and, in fact, no one  
16 contests that these things are very difficult to measure, that  
17 is why you're being asked to consider a royalty as a proxy for  
18 a quantified measurement. The reason is, as Dr. Joachimsthaler  
19 explained, these are things that happen in the minds of  
20 consumers. Once someone has been confused, these things happen  
21 in their mind. And it's not like you can then follow that  
22 person around and see what they buy in the future. You know  
23 that these have occurred, and the way you quantify it in a  
24 trademark case is by saying, OK, we're going to measure that  
25 harm as what would be the value of a license if Thom Browne had

N1CsADI2

Summation - Mr. Henn

1     bothered to come to adidas and say, Hey, let me move into your  
2     yard, and I'll pay you a royalty for it.

3             So the damages in this case, that's the royalty fee.  
4     The parties agree, you heard both Mr. Plumpe and Mr. Imburgia  
5     say, that if you're going to award damages, that's the amount:  
6     867,225.

7             There's also a profits calculation. Mr. Plumpe gave  
8     you a very straightforward calculation. They sold  
9     \$15.6 million worth of products. Deductible costs are  
10    8.6 million. That results in net profits of 7 million. That's  
11    the award.

12            Now, Mr. Imburgia suggests, no, no, that profit is  
13    much lower. Thom Browne's losing money constantly. Selling  
14    \$4,000 sweat suits and yet can't make a dime. To get there, he  
15    proposes the nexus theory where he says pretty much everything  
16    that the company does should be deducted from the revenue line,  
17    so you can get to a very, very small profit line. The Met Gala  
18    becomes an expenses that is related to the products that we're  
19    accusing. Laundry services are being deducted. Gifts, lavish  
20    trips to Paris. There is thousands and thousands and thousands  
21    of dollars of just taxi expenses for Thom Browne that are  
22    deducted from that number. And I mean the person, not the  
23    company.

24            Remember when my colleague showed him the sweatshirt  
25    and was, like, a \$1,400 sweatshirt. You're saying he only

NlCsADI2

Summation - Mr. Henn

1 makes 11 percent profit on this. He sells this for 1200, he's  
2 losing money. There was a lot of fight about, Oh, I can't  
3 possibly answer that hypothetical. You're allowed to use your  
4 common sense. Does it make common sense to you if they sold  
5 this for 1200 bucks, they would lose money on this product?

6 All right. So what do we do with the verdict form?  
7 We fill out the monitor remedies. You're going to be asked  
8 what the damages should be. That's where you write in 867,225.  
9 You will also be asked what profits to award. That's the  
10 7 million number there.

11 You're separately going to be asked about dilution,  
12 and as the judge is going to tell you, we're only seeking the  
13 monetary relief for the infringement claims, so what we've just  
14 been through. But there is a separate claim for trademark  
15 dilution. It's very similar to infringement. And as you'll  
16 see in a minute, a lot of the factors are essentially the same.

17 I'm not going to repeat everything I just went  
18 through, I assure you, but here are some of the factors. Well,  
19 let me start by saying, two prevail on dilution, adidas needs  
20 to show that its Three-Stripe Mark is famous, and that what  
21 Thom Browne is doing is likely to dilute the distinctiveness of  
22 that trademark. It's a lot of what we've already been talking  
23 about.

24 As we went over before when I was talking about  
25 strength of the mark, it is clearly famous. It has clearly

NlCsADI2

Summation - Mr. Henn

1     been famous for a long, long time. No one denies that the  
2     Three-Stripe Mark is famous and is known widely by the general  
3     public. There is really no evidence put in by Thom Browne on  
4     the other side.

5             So the question on dilution for you is, really, are  
6     these products likely to dilute the distinctive character of  
7     the Three-Stripe Mark. And this is where you see some overlap  
8     in the factors, so how similar are the marks. Well, we already  
9     talked about similarity of the marks. OK. It's that notion of  
10    people see it. And they think adidas, people see it and they  
11    think three, and the context in which they are encountering  
12    them.

13            How strong is the Three-Stripe Mark? We've talked  
14    about that already. How widely recognized is the Three-Stripe  
15    Mark. Again, we've already discussed that. Intent. In other  
16    words, did Thom Browne do things intentionally to move into  
17    adidas' area. We've been through that, so I'm not going to  
18    repeat that. Those you should find essentially the same, for  
19    infringement or dilution.

20            Now one of the factors is the extent of third-party  
21    use of stripes. Ms. Arbuckle came to talk to you about third-  
22    party use of stripes, and she showed you some very interesting  
23    stripes from the 1800s, 200 years before the United States  
24    Patent Trademark office granted adidas' trademark registration.  
25    That is it not making the mark weak. Those antebellum outfits

N1CsADI2

Summation - Mr. Henn

1 and military uniforms do not somehow dilute the Three-Stripe  
2 Mark in 2023.

3 The other factor is has there been evidence of actual  
4 association. Now, similar to confusion and infringement, the  
5 test is a likelihood of dilution, not actual dilution. OK.  
6 So in the context of confusion, I said we don't have to show  
7 actual confusion. But where it exists, pretty obvious that it  
8 is likely. With regard to dilution, the same kind of analysis  
9 applies. The test is likely dilution. But where there is  
10 evidence of actual association, dilution is very likely.

11 So what is the evidence of actual association? Well,  
12 again, we've got social media posts in the record where people  
13 saw these products and thought adidas. Now this person writes  
14 "mock adidas." So this person was not confused, right. They  
15 didn't think it was adidas. They are pointing out that it  
16 looks like adidas. That's the difference between infringement  
17 and dilution. Infringement is about are they confused.

18 Dilution is are they associating these two designs in  
19 their mind, and if they are, that's what dilution is. Because  
20 when you associate them, you start blurring the lines between  
21 what is adidas and what is not. So this person clearly  
22 associated it with adidas. This person also associated it with  
23 adidas. Probably not somebody who was confused, right. They  
24 say "adidas" and they've got little laughing emojis. They  
25 figured out it wasn't adidas, but adidas came to mind when they

NlCsADI2

Summation - Mr. Henn

1 saw these, and it could be because of how the stripes are.

2 Adidas and the survey, remember, it asked those  
3 questions about do you think this is affiliated with,  
4 connected, sponsored by adidas? And you had overwhelming  
5 levels. Everyone who said adidas in response to Hal Poret's  
6 survey necessarily thought adidas because they couldn't have  
7 figured out how to type it out if they didn't think of it. The  
8 survey is also evidence of association.

9 Then we had a long testimony about how the brain  
10 works, and I don't want to bore you with all of that again.  
11 Suffice it to say, we were trying to explain through  
12 Dr. Joachimsthaler how dilution happens because it's kind of a  
13 fuzzy concept. You're like, wait a minute, how is this a  
14 problem? Dr. Joachimsthaler explained that we have these  
15 memory networks in our head because of exposure to brands, and  
16 then he relied on tons of empirical research, a study from 2005  
17 that showed that, unprompted, just think of adidas in your  
18 mind, what do you think of? Three stripes, 65 percent. Almost  
19 as much as Nike. Remember in the study, 70 percent said the  
20 swoosh.

21 He did his own survey where 52 percent associated  
22 three stripes with adidas and he relied on studies that adidas'  
23 outside market research companies had done where three stripes  
24 was at the center of what respondents in their survey said when  
25 they asked about adidas. So this is based on hard science.

NlCsADI2

Summation - Mr. Henn

1           We went through tons of market research decks. You  
2           were probably wondering, why am I looking at all these spider  
3           graphs? The reason was because Dr. Joachimsthaler used those  
4           spider graphs in order to fill out his model of how an example  
5           of an adidas memory might be. Yours might be different. Mine  
6           might be different. Everyone in this courtroom might have a  
7           slightly different memory network. This is representative.

8           The idea is that stripes are closely associated as are  
9           things like authenticity and sport credibility. And then he  
10          went about trying to come up one for Thom Browne. They don't  
11          do any market research, so he is basing this on what testimony  
12          he was able to read and what documents he was able to review.  
13          Then he said, OK. How do we know whether there is actual  
14          association? How do we know that one of these memory networks  
15          gets triggered by the other. You know what, let me look at the  
16          data.

17          And he went back to Hal Poret's survey and he looked  
18          at those verbatims. And he said, Oh, we have hard data that  
19          these memories are getting blurred, because people saw the Thom  
20          Browne products and they thought adidas, and they saw three  
21          stripes. With women's products, with men's products, and with  
22          the shoes. Again, empirical proof for what Dr. Joachimsthaler  
23          told you.

24          And so then he says, What happens based on decades of  
25          consumer psychology research? What happens? Spreading



NlCsADI2

Summation - Mr. Henn

1 activation or activation spreading. The idea is when you see  
2 the four stripes of the Grosgrain and you think of adidas,  
3 those things get connected. And it sounds kind of crazy. But  
4 guess what? The two Ph.D. doctors that came in both agreed  
5 that this is sound science. Dr. Joachimsthaler described it,  
6 and I asked Dr. Steckel, you agree with me that spreading  
7 activation is well-settled in this area. And he said it's  
8 basically the foundation of a lot of market research. We know  
9 this is how this happens. And so based on the data in the  
10 case, you have a lot to rely on.

11 And what was Thom Browne's evidence on this? Nothing.  
12 Remember I asked Dr. Steckel, are you offering an opinion that  
13 this doesn't happen? Oh, no, no, no. I'm not offering that  
14 opinion. Are you offering an opinion that the market is not  
15 famous? Oh, no, no, not offering that. Are you offering any  
16 opinion that dilution is not likely? Nope. Nope, not offering  
17 that opinion.

18 So there is no response in the record. So the mark is  
19 famous. It has been for decades. The products are clearly  
20 likely to dilute the distinctiveness of the Three-Stripe Mark,  
21 and there is no counter evidence for you to put on the other  
22 side of the scale there. So when you're asked about dilution,  
23 you should find Thom Browne liable.

24 I'm going to finish where I began, and that is you  
25 might like adidas. You might not like them. You might like

N1CsADI2

Summation - Mr. Henn

1 Thom Browne. You might not like him. But really what you're  
2 here to do is to protect the public from confusion. That's  
3 your job. If you think that the evidence was more in favor of  
4 a likelihood of confusion, you have to find Thom Browne liable,  
5 and you have to do that on behalf of the consuming public. The  
6 same public, 27 percent of whom were confused by what they were  
7 shown in the Poret survey.

8 Thanks for your attention.

9 THE COURT: Thank you very much.

10 All right, ladies and gentlemen, we'll take a  
11 15-minute break.

12 (Jury not present)

13 There was an objection.

14 MR. HENN: Yes, your Honor.

15 We obviously do not object, as I just did as to  
16 referring to testimony, but several of the slides in  
17 defendant's decks have actual transcript pages which is, I  
18 believe, improper to show a jury since the transcripts are not  
19 evidence and they are supposed to be deciding on the collective  
20 memory of the witnesses that occurred on the stand.

21 THE COURT: No, no. I think someone put up on the  
22 screen an example of one of these demonstratives.

23 I'm going to see where the reference is to page  
24 numbers.

25 MR. HENN: It's at the lower right corner.

N1CsADI2

Summation - Mr. Henn

1 THE COURT: Oh, I see. First of all, I don't see any  
2 objection.

3 Second, I think it's mainly an eye test for our  
4 jurors.

5 But no, that objection is overruled.

6 MR. HENN: Thank you, your Honor.

7 THE COURT: Very good. See you all in 15 minutes.

8 (Recess)

9 Please get the jury.

10 All right. We're ready to hear from defense counsel.

11 MR. MALDONADO: Thank you, your Honor.

12 Ladies and gentlemen of the jury, adidas does not own  
13 stripes. Remember that as you consider the evidence, as you  
14 consider your verdict. Adidas does not own stripes. And  
15 that's what this case is about. It's not about competition.  
16 These parties do not compete. It's not about diluting the  
17 adidas brand. You haven't seen any evidence of dilution of  
18 adidas' brand. This question is about does adidas own stripes,  
19 and adidas does not own stripes.

20 Now before we get into the summary of the evidence --  
21 and I'm going to be the last lawyer to speak to you; we're  
22 almost at the end here -- thank you. I want to thank you all  
23 for your time that you devoted to this and for listening to the  
24 evidence, for your patience. We've seen each other every day  
25 for the past two weeks, and it's almost at the end. I want to

N1CsADI2

Summation - Mr. Henn

1 thank you for staying engaged even when it was difficult, even  
2 when you heard witness after witness get on the stand and talk  
3 about things that don't matter.

4 But remember, as I told you during my opening  
5 statement, the facts in this case are simple. And hopefully,  
6 by now, you've heard all the evidence and you agree that the  
7 facts in this case are really quite simple. Now, you've made a  
8 sacrifice of your time. Thank you for being here. Many if not  
9 all of you did not know Mr. Thom Browne when this case started.  
10 But now you do. He's been here in court every day. He's here.  
11 He's testified. He's told you his story. And it's a very  
12 different story than what you've heard from Mr. Henn. He's  
13 here because he cares a lot about this case. For himself. For  
14 his employees.

15 The defendant Thom Browne, Inc., the company that he  
16 founded, he poured his heart, his soul, and every penny he  
17 earned into his company. He devoted himself to his company  
18 100 percent. He's worked to build a reputation and a brand,  
19 and he succeeded, and that is why he's here today. He's  
20 recognized as a game changer. An icon in the fashion industry.  
21 This case is important to him, and he's here for that reason.

22 Quite frankly, ladies and gentlemen, the notion that  
23 Mr. Thom Browne wants to trade on the reputation of adidas and  
24 build his brand on adidas, a performance sports company, that  
25 offends him. Nothing against adidas. They are a great

NlCsADI2

Summation - Mr. Henn

1 company. They are successful at what they do. But Mr. Browne  
2 is not adidas.

3 Now, ladies and gentlemen, Mr. Browne took the stand  
4 and told you under oath his story, and I know that you listened  
5 to it. You didn't hear any mention of adidas in that story,  
6 aside from the dispute that arose in 2007 and then laid dormant  
7 and quiet for more than ten years until 2018. You didn't hear  
8 any testimony from him, or from anyone else at his company,  
9 including his director of design, about adidas. They never  
10 talked about adidas. They never considered adidas. They  
11 didn't have any interest in imitating adidas.

12 And why not? Because Mr. Thom Browne is a luxury  
13 designer. And as I told you in my opening, and as the evidence  
14 has shown, Thom Browne and adidas are worlds apart. Why on  
15 earth would a high-end luxury brand like Thom Browne want to be  
16 associated with a performance active-wear company like adidas?  
17 There is no reason for that. You didn't hear any reason from  
18 Thom Browne's witnesses, and you didn't hear any reason from  
19 adidas' witnesses. There simply is no reason.

20 And it's my hope as you sit here and you listen to the  
21 evidence and you got to know Mr. Thom Browne as a person, as a  
22 designer, and as an icon in the fashion industry, you got a  
23 sense for his company, from the rack of clothing that we  
24 brought into this courtroom and you got to see. This is Thom  
25 Browne. This is the clothing that he sells. And on that rack,

NlCsADI2

Summation - Mr. Henn

1 yes, there is sweatpants that are accused of infringement.

2 There is a sweatshirt accused of infringement. But this is how  
3 he displays his goods. This is how he sells his goods. This  
4 is who he is, and that's what we wanted you to see.

5 Now, Mr. Henn would like you to take those sweatpants  
6 off the rack and throw them on a chair and pretend that that is  
7 Thom Browne. But that's not Thom Browne. And you saw him in  
8 his presentation earlier, when he was examining witnesses, you  
9 saw him take the clothes off the rack and throw them on the  
10 chair. He wants to create a different Thom Browne that is not  
11 Thom Browne. It's not a Thom Browne that exists in this world.

12 Now, the court will instruct you on the law, but as  
13 the court told you, you're not going to be asked to decide  
14 whether adidas' claims are too late and should be barred  
15 because adidas unreasonably delayed in complaining about what  
16 Thom Browne was doing. The judge will decide that issue.

17 Instead, you'll decide whether there is trademark  
18 infringement and whether there is dilution. There isn't.  
19 There is no trademark infringement. There is no dilution. In  
20 deciding those issues, the long history of this dispute, and in  
21 particular the silence by adidas over ten years as Thom Browne  
22 grew his business and built his brand, will still be relevant  
23 to your consideration of whether Thom Browne in any way acted  
24 in bad faith. He did not act in bad faith. Every decision he  
25 has made, every step of the way, has been made in good faith

N1CsADI2

Summation - Mr. Henn

1 and in full respect of adidas' asserted rights to three  
2 stripes. They told him to stop, and he did.

3 As I said to you before, adidas does not own stripes.  
4 And I ask you to keep in mind, as you evaluate the evidence and  
5 reach your verdict, the fundamental facts that I pointed out to  
6 you during my opening. You may recall that adidas' rights in  
7 the Three-Stripe Mark are limited. That Thom Browne uses four  
8 horizontal bars on the left side, not three vertical stripes.  
9 There is no evidence of confusion in this case in the 10,  
10 15 years that Thom Browne has been selling sweatpants. He's  
11 been using the four bars. He's been using the Grosgrain. No  
12 evidence of confusion at all. And fourth, the parties are  
13 worlds apart and they do not compete.

14 So let's take a look now at the evidence. As Mr. Henn  
15 told you, we're going to look at the likelihood of confusion  
16 factors in deciding whether there's confusion between these  
17 products. And, first of all, we're going to look at the  
18 registered trademarks. And you've seen these during the  
19 presentation of evidence. Adidas owns registrations for  
20 clothing, and that's shown on this slide. Each item of  
21 clothing, you see three stripes, vertical stripes on both  
22 sides.

23 In all the registrations, the last one is what we call  
24 a quadrilateral registration, which we'll talk about  
25 separately. On this slide, we see footwear. adidas owns and

NlCsADI2

Summation - Mr. Henn

1 asserts in this action these registrations on footwear. In  
2 each one you see three diagonal stripes. Again, we have the  
3 quadrilateral registration at the end. That applies to the  
4 apparel and the clothing. No horizontal stripes in neither of  
5 these slides.

6 Finally, here is the headwear. These are the  
7 registrations asserted in this case that adidas owns and is  
8 asserting, even though as you've seen through the lists of  
9 accused products, there is no hats that are accused of  
10 infringement in this case. And you see over there on the rack  
11 that we brought into court, you see a hat. And that hat has  
12 four vertical bands down the front. adidas owns a registration  
13 for a hat with three horizontal lines around the rim. That hat  
14 is not accused of infringement. Those vertical stripes or  
15 bands do not infringe those horizontal bands. Keep that in  
16 mind as you consider the evidence.

17 Also, as you look through the trademark registrations  
18 owned by adidas, you'll see since these are design  
19 registrations. Each registration also includes a description  
20 of what the trademark is. You'll have a chance to look at all  
21 these and read those for yourself. They are all described in  
22 words. It's not just pictures. And in this case for this  
23 963 registration, you see the mark consists of three parallel  
24 bands positioned along the length of each sleeve of a jacket,  
25 and it tells you that this image that accompanies the



NlCsADI2

Summation - Mr. Henn

1 registration is intended to show the position of the mark.  
2 It's not covering a trademark in any other location or any  
3 other number of stripes.

4 Is there a likelihood of confusion? Decide for  
5 yourselves. Look at these registrations, three stripes down  
6 the sleeve. Look at these accused shorts. We've got four  
7 parallel bands on the left side only. Nothing alike. No  
8 confusion. Now, to be sure, adidas does own a registration for  
9 shorts. But, again, it's three vertical stripes down the  
10 sleeves of the shorts.

11 Let's talk a little bit about this registration. This  
12 is what we call the quadrilateral registration. Now, in this  
13 case, adidas has a trademark registration for this design, and  
14 it's described as you see in the registration certificate as  
15 three diagonal quadrilaterals positioned parallel to each other  
16 upon a contrasting background. And you look at the items  
17 accused of infringement, the items sold by Thom Browne. You're  
18 not going to see any parallel diagonal quadrilaterals as shown  
19 in this trademark registration. Is there a likelihood of  
20 confusion?

21 Here's an example. Here is the registration we just  
22 discussed. Here is a polo shirt accused of infringement. It's  
23 got the Grosgrain down the sleeve on the side there. That is  
24 nothing like the quadrilateral registration on the left there.  
25 Those are not diagonal lines.

NlCsADI2

Summation - Mr. Henn

1           So what is the Three-Stripe Mark? That's the big  
2 question of the day. What is this Three-Stripe Mark that  
3 adidas asserts?

4           We've heard testimony from various adidas' witnesses,  
5 and there's someone mystery about what this Three-Stripe Mark  
6 is. So we look here at the testimony of Chris Murphy, and he's  
7 the senior vice president of brand marketing at adidas. Now,  
8 he was asked about adidas' trademarks, you know, and he says,  
9 is adidas known for two stripes? It's not known for two  
10 stripes, is that right? He said correct. adidas is not known  
11 for five stripes or six stripes? That's true. adidas is not  
12 known for four stripes? That's true. In fact, adidas doesn't  
13 use two stripes? We do not. adidas doesn't use four stripes?  
14 No. Or five stripes? Or six stripes? No, no, no. It's  
15 always three? Correct. And adidas is not known as a  
16 four-stripe brand? We are not. Or a brand with four stripes?  
17 No, we are not. Is adidas a brand with horizontal stripes?  
18 No, we are not. And it isn't known for any number of stripes  
19 other than three? Correct.

20           Yet you then hear testimony from Ms. Dana Kabela, and  
21 she is a director of trademark counsel for adidas. Now adidas  
22 is known for a number of stripes, doesn't own rights in any  
23 other number of stripes. Yet when you ask, Does adidas claim  
24 rights in two stripes? Well, we are not claiming rights on two  
25 stripes, but two stripes can infringe the Three-Stripe Mark.

NlCsADI2

Summation - Mr. Henn

1 Oh, really. How about four stripes? Yes, that can infringe,  
2 too. Oh, so what about one stripe? Yes, that can infringe,  
3 too. OK. How about five stripes? Yes, that can infringe,  
4 too. Can six stripes infringe? Yes, six stripes can infringe,  
5 too.

6 So any number of stripes can infringe the Three-Stripe  
7 Mark. adidas believes it owns stripes, but it doesn't.

8 We heard testimony from Ms. Vanessa Backman. I'm sure  
9 you won't forget that testimony. Let's hear a snippet from  
10 her. She was the in-house counsel at adidas when this dispute  
11 first arose in 2007. She reached out to Thom Browne. She made  
12 him change, she made him drop his three bars. And let's see  
13 what she thinks of Three-Stripe Mark is.

14 (Video played)

15 That's the definition of the Three-Stripe Mark. It's  
16 the Three-Stripe Mark. What does that mean? Nobody knows.

17 And so the witnesses have different ideas, different  
18 answers to this. If we look here at the next slide. We talked  
19 about what was referred to as smushed stripes. These are  
20 stripes that are smushed together. There is no space between  
21 the stripes. And we had Mr. Chris Murphy, the senior vice  
22 president of brand marketing at adidas, testifying about the  
23 Gucci stripes on this article of clothing, this collaboration  
24 article of clothing here shown on slide 18.

25 And the question was, It's your testimony that the

NlCsADI2

Summation - Mr. Henn

1 green/red/green -- that's the three stripes no spaces in  
2 between -- is that adidas' Three-Stripe Mark? He answers, I  
3 didn't create the product. It certainly could be. But can we  
4 agree that's not adidas' stripe mark, the green/red/green?  
5 Well, it could. Then he says, We use three stripes in a number  
6 of ways. Sometimes smushing the stripes together, sometimes in  
7 different patterns. I'm sure we've used green/red/green in the  
8 past.

9 Ladies and gentlemen, I don't think you've seen any  
10 examples of adidas stripes smushed together. And yet adidas  
11 thinks it owns stripes smushed together. Or does it? When we  
12 asked Ms. Sara Vanderhoff about stripes smushed together, the  
13 question was: If three stripes or stripes are together,  
14 squished together with no space in between, would that be a  
15 version of the Three-Stripe Mark? Ms. Vanderhoff said, I would  
16 have to see it, but typically we do have a space between the  
17 stripes.

18 We asked her about the Gucci trademark where the  
19 stripes are squished together. She said, That is Gucci's  
20 trademark, that's not Three-Stripe Mark. So according to one  
21 adidas witness, the Gucci stripe is the three-stripe trademark  
22 and another witness says it is not. It's a complete lack of  
23 clarity.

24 Now let's talk about orientation, because as I've told  
25 you and as you've seen in the registrations that adidas owns,

NlCsADI2

Summation - Mr. Henn

1 adidas' three stripes are vertical. They are down the side of  
2 at pant, down the side of a sleeve. In this case, they are  
3 asserting them against Thom Browne's four bars, which as you  
4 see are horizontal.

5 What rights does adidas own? So let's look here at  
6 the testimony of Chris Murphy. Now, Mr. Murphy was asked what  
7 the Three-Stripe Mark is, and he says it's three parallel  
8 stripes. Does it matter how big or small they are? Nope, it  
9 doesn't matter. We've gone through all the products. They are  
10 shown in a variety of width, variety of colors, and a variety  
11 of placements.

12 He's asked, Is the horizontal use of three stripes  
13 different from the vertical use of the three stripes? His  
14 answer, It's not. We're the brand with three stripes. Just to  
15 be clear, how many Three-Stripe Marks does adidas own? Only  
16 one.

17 So adidas believes that it's one Three-Stripe Mark is  
18 not only vertical, but it's horizontal. It's any number of  
19 stripes together, separated. Doesn't matter. But then again,  
20 it depends on who you ask.

21 Now, Mr. Murphy showed us a collection that he made of  
22 exemplary ads. These are ads of adidas goods, and he put  
23 together this whole collection of ads, Plaintiff's Exhibit 22.  
24 Look through all that. You'll get the evidence at the end of  
25 this. You can go through the exhibits yourselves. If you want

N1CsADI2

Summation - Mr. Henn

1 to take a look at Exhibit 22, look at all the examples of  
2 adidas' use of stripes. As you go through this exhibit, you're  
3 not going to see any use of horizontal stripes. You're going  
4 to see vertical stripes, and that is what adidas is known for.

5 Mr. Paul Bowyer, you may remember him, the VP of  
6 originals, partner brands and basketball at adidas. He was  
7 asked about horizontal stripes, and he presented this Exhibit  
8 84, which you'll see the first page of here on the screen. And  
9 he told you, well, this is a compilation that adidas put  
10 together, and this was done after his deposition when he was  
11 asked, how long has adidas been using horizontal stripes? He  
12 said, Well, I don't know. So after his deposition he did some  
13 research. And adidas said, let's go through all our archives  
14 in Germany, wherever they keep them, and let's see how long  
15 have we been using horizontal stripes. They put together this  
16 wonderful exhibit here at the convenience of all of you, so you  
17 can see indeed how long has adidas been using horizontal  
18 stripes.

19 And he says, you know, the first use that he was able  
20 to find goes back to 1979, and he shows horizontally on the  
21 sleeves of polo shirts. But you'll see that this collection is  
22 not just horizontal stripes. It also includes various other  
23 stripes -- I'm sorry. One second.

24 You'll see also that this exhibit here, you'll see how  
25 many items. We asked him, How many items have you sold in the

N1CsADI2

Summation - Mr. Henn

1 past that have horizontal stripes? And he says, I couldn't  
2 tell you exactly how many horizontal, vertical, or diagonal.  
3 They don't classify that in their systems. They don't track  
4 that in their systems.

5 Yet, he did testify and told you that each year, or  
6 each season, adidas makes 40,000 original styles. 40,000 per  
7 season. That's 80,000 original items, styles per year. Now  
8 this exhibit that we just looked at collected examples of  
9 horizontal stripes over the past 50 years. This is 50 years of  
10 adidas products, collection of their use of horizontal stripes.  
11 That's 50 times 70. We're talking, like, one and a half  
12 million styles over that time period. And out of those, adidas  
13 presented us with just 163 pages showing horizontal use of  
14 stripes. Over 50 years, 160 pages. That's a very minute  
15 percentage. He was asked and he agreed, a very minute  
16 percentage.

17 Ladies and gentlemen, adidas is not known for  
18 horizontal stripes. Whatever minimal use they may have made  
19 over the last 50 years, that's not what they are known for.

20 These are other examples that are in the same book  
21 that we just looked at. And as you look through the evidence,  
22 ask yourself as you see things like this, is this really  
23 adidas? I mean, these are various uses of stripes. You see  
24 V stripes on these various jackets. These are adidas products,  
25 but this is not what adidas is known for.

NlCsADI2

Summation - Mr. Henn

1           You heard some testimony and saw some evidence about  
2 the Neuclassics, adidas' Neuclassics collection. When was that  
3 launched? This was launched just last year. This is a new  
4 collection launched just last year where adidas decided to use  
5 three horizontal stripes only on the left sleeve, as you see  
6 here in this image. Just last year they made that decision.

7           And this is the adidas Adicolor Neuclassics hoodie, as  
8 you see here on the screen in front of you, and adidas tells  
9 you in its own description. This is its own add-on his web  
10 page where it advertises this product. And if you look at this  
11 here, it tells you that the stripes are not where you usually  
12 see them. This is not a usual branding that adidas has used.  
13 Adidas has decided, for this collection released just last  
14 year, that it is only going to wrap its stripes around one  
15 sleeve, on the left sleeve of the top. That's just a decision  
16 that they made last year.

17           Now, we've talked about this says it's not where you  
18 usually see the adidas stripes. So one of adidas' witnesses  
19 testified, Where do you usually see the adidas stripes? This  
20 is what adidas refers to as the classic positions. And this is  
21 Dana Kabela, the director of trademark counsel for adidas. She  
22 was asked, And what are the classic positions of the  
23 Three-Stripe Mark? She tells us the classic positions are, for  
24 example, on the sleeves, running from the neck to down the side  
25 of the sleeve. On both sides, left and the right? Yes. And



NlCsADI2

Summation - Mr. Henn

1 what are other classic positions? On the pants, on the sides  
2 of the pants in a vertical position.

3 Ladies and gentlemen, that is what adidas is known  
4 for. Those are the classic positions. Now, adidas has  
5 internal branding guidelines. Adidas, as you know, is a huge  
6 company, worldwide company based in Germany. They have  
7 designers all over the world designing their products. They  
8 have to provide some guidelines for their designers, how can  
9 you use stripes when you're designing adidas products. They  
10 want to make sure people aren't doing things they shouldn't do.

11 Why? Because they want brand consistency. They want  
12 you to know, when you see stripes on a product, that it is  
13 adidas. They want to make sure they are using their brand in a  
14 consistent way. And they say in this branding guideline, here  
15 on slide 28, consistent use of branding means that we can  
16 maintain exclusive ownership for our trademark and broadens the  
17 scope of the protection that we have for them.

18 Let's see what the branding guidelines say about  
19 stripes. So there is this guideline here on the angling of  
20 stripes. As I told you, adidas is known for vertical stripes,  
21 and so sometimes designers may want to tilt the stripes. So  
22 you can tilt them, but only to 20 degrees. So it can be  
23 vertical or tilted to 20 degrees. That's it. No further.

24 It even says at the bottom here, do not use  
25 horizontally. These are in adidas' branding guidelines, do not

NlCsADI2

Summation - Mr. Henn

1 use stripes horizontally. These branding guidelines include  
2 examples of what is not permitted. These are three stripes  
3 violations. These are things that are not permitted by adidas'  
4 own internal branding guidelines. And here you'll see example  
5 after example of horizontal stripes used on polo shirts. Not  
6 allowed. Those are violations. In fact, it says here at the  
7 bottom, as you can see hopefully on your screen, vertical only.  
8 Do not use horizontally.

9 Let's talk about shoes for a minute. Adidas has  
10 guidelines about shoes and how you apply stripes to shoes, and  
11 one of their guidelines says that you cannot apply the stripe  
12 on the same color background, because then you won't see it.  
13 You can't use a white stripe on a white background because then  
14 you won't see it. They give this example in their materials,  
15 and they claim that this is a violation of their guidelines.  
16 This particular shoe -- white stripe, white background --  
17 violates adidas' guidelines.

18 Yet, curiously enough, if we look at this Thom Browne  
19 product on the right accused of infringement, the middle white  
20 stripe is on a white shoe, a white background, and adidas  
21 accuses that of infringement. Something their own designers  
22 can't even do with their shoes, Thom Browne does it, it's an  
23 infringement. Ask yourself, does that make sense?

24 Another example here on your screen, product branding  
25 guidelines. Here you see jogging pants, jogging pants with

NlCsADI2

Summation - Mr. Henn

1 three bands around one leg. Again, assymetrical use of three  
2 stripes, horizontal stripes, three horizontal stripes on only  
3 one side of the sweatpants. Adidas says you can't do that.  
4 Adidas identifies this as recent executions that undermine our  
5 trademark rights. These are things that adidas tells its  
6 designers you cannot do.

7 So as you review all of this evidence, you ask  
8 yourselves: How is anyone supposed to know what this  
9 three-stripe trademark is? If you're a designer, an industry  
10 out there making clothes, making products for all of you to  
11 wear, how are you going to know what you can and can't do with  
12 all these different and inconsistent messages coming from  
13 adidas?

14 Now, you did hear testimony from Ms. Joanne Arbuckle,  
15 former dean at FIT, and she went through the history of  
16 stripes, the history of the use of stripes on clothing.  
17 Mr. Henn put up some images she found from the 1800s on the  
18 screen. But she also found a lot of very current references of  
19 how other people are using stripes, and those are summarized  
20 here. These are some of them. There is others as well. This  
21 is what we can fit on this particular screen of examples that  
22 she found of the use of stripes on clothing. You can see it  
23 here used on jackets. You can see it used on peacoats. You  
24 can see it used on sweaters. You can see it used on  
25 sweatshirts. You can see it used on jogging pants.

NlCsADI2

Summation - Mr. Henn

1 By various designers, including high-end luxury  
2 designers, Givenchy, we have Karl Lagerfeld, we have Celine.  
3 These are all high-end luxury designers using stripes on  
4 clothing. Stripes on clothing are not new. You can look in  
5 your closet, look at all the clothes you have. I'm sure you'll  
6 see stripes in there. Go in the subway, walk around, you'll  
7 see stripes all over the place. People always use stripes on  
8 clothing. They always have and they always will.

9 Now, adidas focuses its infringement claims in this  
10 case only on selected products. Now, adidas sells a lot of  
11 products, some of which are here on the rack in front of you  
12 that are not accused of infringement but do bear the four-bar  
13 designs. Somehow adidas has decided that some products  
14 infringe and some don't.

15 I showed you during testimony a cashmere sweater  
16 without a hood. That's not accused of infringement. And  
17 another cashmere sweater right next to it, it has a hood, it is  
18 accused of infringement. adidas doesn't necessarily own rights  
19 in hoods, but one product is accused and one is not. Their  
20 infringement allegations are random.

21 (Continued on next page)  
22  
23  
24  
25

N1CQadi3

Summation - Mr. Maldonado

1 MR. MALDONADO: (Continued)

2 Now, Thom Browne, there are over 130 products in this  
3 case accused of infringement. And that's just a small subset  
4 of the products that Thom Browne sells, but all of these  
5 products do fit within Thom Browne's collection. He makes a  
6 collection of clothes, and he fits these items into his  
7 collection so that people can buy jackets. They could buy  
8 sweats. They could buy shirts. They could buy ties that meet  
9 all their needs through his collection, and that's what he  
10 tries to do as a designer.

11 So, in sum, if you look at the registrations that are  
12 owned and asserted by adidas on the left here. If you look at  
13 unregistered uses which are shown on the bottom, some which  
14 adidas calls violations but nonetheless are executions of  
15 adidas, and you compare those to what's infringed in this case,  
16 or what's accused in this case, rather, you see the sweatshirt  
17 with the red, white and blue Grosgrain down the sleeve.  
18 Another sweatshirt with four bars down the sleeves. Ladies and  
19 gentlemen, these are not at all similar to what adidas owns or  
20 claims it owns. There's no difference here. There's no  
21 confusion.

22 So we talked about the differences in the marks. We  
23 talked about the strength of Three-Stripe Mark that's asserted  
24 in this case. Both of those factors weigh against the finding  
25 of confusion.

N1CQadi3

Summation - Mr. Maldonado

1           Let's talk now about competition. Competition for the  
2 same consumers. As you know, and as you've heard throughout  
3 this trial, the parties' products are vastly different price  
4 points. As this slide shows, an adidas pair of sweatpants \$40.  
5 Thom Browne pair of sweatpants a thousand dollars. Now you  
6 have the sweatpants here that I showed you during testimony,  
7 and those are right here, and you've had a chance to feel them  
8 and touch them and see them up close. You can tell the  
9 difference in quality. It's not the same. You had a designer  
10 of Thom Browne sweatpants here on the stand to testify. His  
11 sweatpants are tailored. They're expensive. They're not to  
12 wear to the gym. They're to wear out to look good. And they  
13 are often worn, as you see in this image right here, with a  
14 button-down white shirt. They're worn with more formal  
15 clothing as you see here. They're not the same products.  
16 They're not even competitive products.

17           Mr. Thom Browne was asked about these items of  
18 clothing: What's the retail price of this item that was shown  
19 here on the screen?

20           And he says around a thousand dollars, \$1,200. And he  
21 says, you know, this combined suit, the top and bottom of this  
22 track suit would cost several thousand dollars? Yes. That's  
23 how much it costs.

24           Now we talk to Chris Murphy. He's a senior VP of  
25 brand marketing at adidas. Now, Mr. Murphy was asked about

N1CQadi3

Summation - Mr. Maldonado

1 adidas's goods and where they're sold. And we showed him a  
2 document which was a marketing update and we showed him some  
3 images from that document that you see here on the screen.  
4 Mr. Murphy talked about shop-in-shop spaces. This is where  
5 adidas has a shop within a department store, example. If you  
6 go here -- in this example, if you go into Dicks, there's a  
7 section in Dicks where you'll find adidas goods, and that's  
8 called a shop-in-shop. So adidas has a shop-in-shop in Dicks  
9 Sporting Goods that's dedicated to its products. Adidas also  
10 has a shop-in-shop at Foot Locker, and that shop-in-shop at  
11 Foot Locker, again, dedicated to adidas products.

12 Now, then we asked Mr. Murphy, well, do you think that  
13 when someone -- do you believe that when someone says does  
14 adidas sell or is adidas known for high-end luxury, that most  
15 people would say yes? And he said, "I think a good number of  
16 people would say yes, especially based on some collaboration  
17 they've been doing.

18 "Do you believe most people would say yes?

19 "A lot of people would say yes.

20 "Now that's true even though adidas sells its products  
21 at Dicks Sporting Goods?

22 "Correct."

23 So he believes that even products sold at Dicks  
24 Sporting Goods are luxury products, even though high-end luxury  
25 products are sold at stores like Bergdorf Goodman, Saks Fifth

N1CQadi3

Summation - Mr. Maldonado

1 Avenue, and other chains we've heard about during this trial.

2 Now, Thom Browne, you've heard about his clothing, his  
3 style, his aesthetic. You've heard from Lucas Langellier, the  
4 VP of retail at Thom Browne. And part of Thom Browne -- part  
5 of what Thom Browne is, is not only the tailored clothing that  
6 he designs and sells, but also really a tailored customer  
7 service experience. And Mr. Langellier explained this to you  
8 in his testimony; that when you go to a Thom Browne store, you  
9 get attention. You get personalized attention. Someone will  
10 come up to you. They'll talk to you. They'll ask you  
11 questions. They'll get to know you. They want to know what  
12 you want. They want to show you what you might want, what you  
13 might need. It's a very different experience from shopping in  
14 other stores. What they're trying to do in this sense in their  
15 stores, in their retail stores is to build relationships with  
16 customers, so that the customers become loyal to the brand.  
17 They'll come back. They'll purchase more. They'll be loyal to  
18 the product. And that's how they build their brand loyalty.  
19 Again, as we said, Thom Browne's products are sold at major  
20 department stores at Barneys, at Bergdorf, at Nieman Marcus, at  
21 Nordstrom's, at Saks Fifth Avenue.

22 So, in sum, Thom Browne and adidas, they're, again, on  
23 different levels and different worlds, and they do not compete  
24 for the same consumers. The consumers of Thom Browne's goods,  
25 they pay a lot of attention to what they're doing. When they



N1CQadi3

Summation - Mr. Maldonado

1 go into his store and they in to buy a pair of sweatpants for a  
2 thousand dollars, they're thinking about. They are paying  
3 attention. They pay a lot of attention to detail, and they're  
4 not likely to be confused.

5 Let's talk about the so-called evidence of actual  
6 confusion. First, as I mentioned, and as you know, from the  
7 time that Thom Browne started using four bars and Grosgrain,  
8 through 2018, at least through that whole period, and I would  
9 say even through today, there's no evidence that anyone was  
10 ever confused. No one ever confused Thom Browne for adidas.  
11 And a lot of witnesses were asked about that on the stand.  
12 We'll go through their testimony. You'll recall witness after  
13 witness after witness said have you known of any confusion?  
14 No. No. No. No. No confusion. Adidas knows this, and they  
15 put up a survey, a flawed survey. And I want to point out, and  
16 the Judge will instruct you, that adidas bears the burden of  
17 proof here. Thom Browne doesn't need to do a survey. Thom  
18 Browne doesn't need to show that there was no confusion. If  
19 adidas's survey is flawed, Thom Browne can decide how am I  
20 going to respond? Am I not going to respond? There are things  
21 that don't need responding to. So you shouldn't think just  
22 because Thom Browne didn't run a survey, that adidas's survey  
23 should be the end word on the matter. We'll talk about that  
24 survey and what the problems are.

25 Adidas also presented Instagram comments, anonymous

N1CQadi3

Summation - Mr. Maldonado

1 Instagram comments. I think like five Instagram comments. And  
2 they said, wow, that's confusion. People are really confused.  
3 You can draw your own conclusions there, but let's take a look  
4 here. Now, adidas talked about three times of confusion:  
5 Initial interest confusion, point-of-sale confusion, post-sale  
6 confusion. Now, most cases we looked first at point of sale  
7 because that's where the harm is done. If someone is going  
8 into a store, they're looking at your sweatpants. They're  
9 looking at the other guy's sweatpants, deciding which one to  
10 by. That's where harm really occurs, when someone else buys  
11 someone else's product thinking it's yours. That's called  
12 point of sale.

13 Curiously, adidas did not do a point-of-sale confusion  
14 survey because adidas knows that there's no confusion at the  
15 point of sale. So, instead, adidas looked at initial interest  
16 confusion, which there's no evidence of initial interest  
17 confusion. There's no evidence of anyone going into a store or  
18 flipping through their phone and saying, oh my God, Thom  
19 Browne. I mean, that looks like adidas. Oh, Thom Browne, I'll  
20 buy that instead. I'll buy the thousand dollar sweatpants  
21 because I thought they were adidas. There's no evidence that  
22 that has ever happened or that it ever will happen. Then they  
23 looked at post sale, and that's Mr. Poret's survey, which we'll  
24 talk about in a minute.

25 Actually, we'll talk about it now. So Mr. Poret, this

N1CQadi3

Summation - Mr. Maldonado

1 is adidas's consultant and survey artist. He did a survey,  
2 which he calls a post-sale survey. But you'll remember his  
3 testimony, and you'll remember the images that he used in his  
4 survey, and those were not images taken in the real world. So  
5 post-sale confusion is supposed to test confusion in a real  
6 world environment. When you see pants on the street, when you  
7 see them in the store, when you see them wherever, wherever  
8 people are in life, that's what post-sale confusion is supposed  
9 to test. Yet in his survey, he didn't use post-sale confusion  
10 photos. He didn't use photos in the real world. He used  
11 photos in an art studio. Photos in a photographer studio of  
12 models with white backgrounds. Mr. Henn said he didn't want  
13 you to be confused by trees and butterflies and things in the  
14 background because then you wouldn't really focus on the  
15 stripes. But that's the whole point. The whole point is what  
16 do you see out on the street in the real world. What do you  
17 pay attention to? What do you focus on?

18 Here we see the testimony of Mr. Poret, and he agrees,  
19 we're comparing here, if you recall, on the left is adidas's  
20 website, and on the right is an image that was used in  
21 Mr. Poret's survey. By the way, the images in Mr. Poret's  
22 survey came from adidas. Adidas provided the images. And it's  
23 kind of funny how much they look like adidas images. You see  
24 the similarities here. Mr. Poret testified, you know, I agree  
25 they both have white backgrounds. It's a pretty standard

N1CQadi3

Summation - Mr. Maldonado

1 background for a clothing website, but, yes, they're both  
2 essentially white.

3 Now, would you agree, he was asked, that adidas has  
4 point-of-sale photos because photos on the website are  
5 point-of-sale photos, that's where you make a purchase on the  
6 website. He says, would you agree that adidas has  
7 point-of-sale photos that look like post-sale photos. And he  
8 says, yes, he admits there's similarities, and you could see  
9 that for yourself. It's evidence.

10 Now, this is the testimony he had showing his  
11 relationship with adidas. This isn't the first case that he's  
12 testified in favor of adidas. There's been many, many cases  
13 which Mr. Poret has design surveys for adidas.

14 This is the testimony where Mr. Poret says that he  
15 admits he wasn't the photographer. He didn't take the photos.  
16 And that he got the photos from adidas. And, again, if you  
17 look at these photos and think about it and think about images  
18 that you've seen of adidas, it's obvious to anyone that these  
19 photos and these models were made to look like adidas, as close  
20 to adidas as they could get. You don't see any models here as  
21 is displayed on Thom Browne's website in a white button-down  
22 shirt with sweatpants. You don't see that here. What do you  
23 see? You see people in sports clothes. They mix and match  
24 some of Thom Browne's clothes with other sports clothes and  
25 T-shirts. They have athletic poses. You have the model

N1CQadi3

Summation - Mr. Maldonado

1 holding her arm like this to turn the horizontal stripes  
2 vertical; you see that in the first image. So you have all  
3 these images that were purposely taken and made to look as  
4 close to adidas as they could. And that, ladies and gentlemen,  
5 is a serious, serious flaw to this survey.

6 Again, this is a very good example. I mean, the other  
7 ones were studio pictures of clothing that were taken by  
8 adidas. This is actual image from Thom Browne's website.  
9 Think about that. That's an image from Thom Browne's website.  
10 That is point of sale. Thom Browne's website is where you go  
11 to buy Thom Browne's products. They take the image from the  
12 point of sale and they put it into their post-sale confusion  
13 survey. You know why they do that? So that you can't see the  
14 price. You can't see that it's on Thom Browne's website. You  
15 can't see all the things that you would see in a normal  
16 purchasing environment. It's stripped all that away, they take  
17 the image and they put it in front of someone and they ask  
18 questions. That, ladies and gentlemen, is not a post-sale  
19 survey.

20 Another interesting thing. You saw images -- I mean,  
21 Mr. Henn was really upset about some of the images that he put  
22 on the screen that showed the Grosgrain on clothing down the  
23 sleeve and down the leg, you might remember that? Funny thing  
24 is Mr. Poret didn't test any of that clothing. Not a single  
25 piece of clothing with Grosgrain was tested in the survey. The

N1CQadi3

Summation - Mr. Maldonado

1 only Grosgrain product that Mr. Poret tested was a sneaker. So  
2 the clothing that is so outrageous and so close to adidas  
3 wasn't even tested. Think about that.

4 As I mentioned to you earlier, it's been over a decade  
5 of coexistence with no actual confusion. And you'll see here  
6 on the screen the very first runway show Thom Browne in 2009  
7 where the sweatpants with the four bars were debuted, right  
8 here on the screen, 2009. We go through all these years, from  
9 2009 through 2018, no confusion. People aren't confused. And  
10 yet now adidas wants you to believe that there's a high  
11 likelihood of confusion. There's no actual confusion. But  
12 there's a high likelihood that people are now all of a sudden  
13 going to start to be confused. They're not.

14 Social media. So we have Instagram posts, Instagram  
15 comments that Mr. Henn put on the screen. Think about that  
16 again. How many did he put up? How many are in evidence? How  
17 many were shown to you? Just five. Five over 15 years. Just  
18 five Instagram posts which allegedly show confusion. We don't  
19 think they show confusion at all. Someone says adidas, does  
20 that mean they're confused? No. What would adidas say?  
21 That's not confusion. I mean, Who are these people anyway? We  
22 don't know who they are. Many of you probably have Instagram,  
23 and you look at posts, you don't know who says what, who these  
24 people are, what they're saying, what they mean. We can't find  
25 these people. Try to ask Instagram who that user is, they're

N1CQadi3

Summation - Mr. Maldonado

1 not going to tell you. Try to get a court order, that's is  
2 going to be hard to get on its own. We don't know who the  
3 people are. We don't know What they mean by what they say.  
4 And, most importantly, this evidence is so minimal, so de  
5 minimus that it does not prove actual confusion in no way,  
6 shape or form.

7 Thom Browne's CEO, Mr. Bazan, testified about Thom  
8 Browne's Instagram followers and Facebook follow years. And  
9 Thom Browne has 190,000 Facebook followers, and has 1.3 million  
10 Instagram followers. Lots of followers on Thom Browne's site.  
11 No confusion. Mr. Bazan was asked he's been CEO since 2016.  
12 "have you been aware of any reports of confusion between Thom  
13 Browne and adidas?

14 "A. No."

15 Lucas Langellier, the VP of retail for Thom Browne, he  
16 was also asked about confusion. He's in the store all the  
17 time. He runs all the retail stores. He's in charge of them.

18 "Has anyone ever told you that your 4-Bar signature  
19 product looked just like adidas?

20 "No. Nobody's ever said to me that it's confused Thom  
21 Browne 4-Bar stripe with adidas." He's been in this company  
22 for a long time. Ten years, more. No confusion.

23 "Has anyone told you that Grosgrain signature looks  
24 like adidas's trademark?

25 "No."

N1CQadi3

Summation - Mr. Maldonado

1 "Has anyone confused the product?

2 "No." No reports of confusion for Mr. Langelier.

3 When adidas's witnesses were asked the same question,  
4 we get the same responses. This is Chris Murphy again, VP of  
5 brand marketing at adidas.

6 "At the time of your deposition, you testified that  
7 you weren't aware of any customer complaints or reviews that  
8 mentioned Thom Browne."

9 He said no.

10 "You had not seen any reviews or complaints where a  
11 consumer had indicated to adidas that he or she was confused  
12 between adidas and Thom Browne?

13 "No."

14 He doesn't no anything about confusion either. He's  
15 been in that position a very long time.

16 Paul Bowyer, also testified, the VP of Originals,  
17 asked similar questions. He's been at adidas since 2012, ten  
18 years now, over a decade.

19 "During that time have you seen any quantitative or  
20 qualitative data of confusion, any actual confusion?

21 "A. No."

22 No confusion. No evidence of confusion. Poret's  
23 survey, not valid; flawed; does not show confusion.

24 Five Instagram posts. No. That doesn't do it.  
25 There's no evidence of confusion.



N1CQadi3

Summation - Mr. Maldonado

1           Let's talk about the quality of the product. Now,  
2 Mr. Henn told you the quality of the products are similar. One  
3 thing funny is how many products did adidas bring into the  
4 courtroom for this case? Zero. You haven't seen a single  
5 adidas product in this case. Yet he wants you to believe that  
6 the quality is similar.

7           Now, you have heard from Thom Browne's witnesses that  
8 his products are undeniably high in quality, and you see here  
9 the sweatpants here, you've seen here the sweatpants in front  
10 of you, talked about the intarsia, how the stripes are woven  
11 into the material, and, I mean, Mr. Henn suggested you can't  
12 see that from far away. I think you can. I think if you look  
13 over there at those products on the rack, you can see that  
14 those are not sewn-on stripes. You can see that they're woven  
15 into the fabric.

16           The other thing you can see, ladies and gentlemen,  
17 from here, from across the room looking at the rack, those  
18 clothes are expensive. That's an expensive rack of clothes.  
19 You can tell that from across the room just looking at that  
20 rack. You don't need to go up to the clothes. You don't need  
21 to feel them.

22           Mr. Browne told you that Thom Browne has always aimed  
23 for the highest quality in the clothing that he designs. He  
24 wanted his clothing to have that true, American sensibility,  
25 handmade clothing of the best quality.

N1CQadi3

Summation - Mr. Maldonado

1           Mr. Bazan also agreed about the quality of the  
2 clothing. He talked about the highest raw materials, highest  
3 quality fabric, about the attention to detail. Thom Browne's  
4 products are of a superior quality.

5           Let's talk a little about bad faith. The Judge will  
6 instruct you on bad faith. You heard about the inspiration for  
7 Thom Browne's designs. He was inspired by the varsity sweater  
8 as you see on the slide. And you've seen other images of  
9 varsity sweaters during this litigation. Undeniably, varsity  
10 sweaters, stripes on the left sleeve. Thom Browne bands on the  
11 left sleeve. That was his inspiration. You're not going to  
12 see anything from adidas that looks like that from this time  
13 period. From last year you might see something, but not in  
14 this time period.

15           November 2006, Mr. Browne opens his store in Tribeca.  
16 We've all seen this article. We've heard a lot of testimony  
17 about this. This was his first retail store in New York,  
18 opened in 2006. At that time when this article came out,  
19 Vanessa Backman got a copy of the article. She sends it to  
20 Mr. Henn. This is on November 15, 2006, her outside counsel.  
21 She sends him this article about Thom Browne and the store in  
22 Tribeca. One week later, November 21, she sends it again to  
23 Mr. Henn. She sends him the article again. This time the  
24 picture of the sports coat with the three bars is circled. You  
25 see the circling there and the arrow.

N1CQadi3

Summation - Mr. Maldonado

1           Now, Mr. Thomas Becker was the CEO of Thom Browne in  
2           2007 when the dispute between adidas and Thom Browne first  
3           started. He was there at the company, and he testified that  
4           the change from three to four stripes was made because of  
5           adidas. We all know that. That's the only reason that Thom  
6           Browne stopped using the three stripes was because of adidas.  
7           In good faith, to avoid a dispute, Thom Browne stopped his  
8           three bars, changed to four bars, to avoid an IP dispute.

9           The images, the emails, this is email correspondence  
10          that you've seen between Thom Browne and his factory. You saw  
11          this email from Sam Lothrop to Lisa Wood at the Corgi factory  
12          where they manufacture their knitwear. Mr. Lopthorp says in  
13          this email, "We're changing our stripe layout for the left  
14          sleeve before adidas sues our short pants off."

15          Ladies and gentlemen, there's no question that Thom  
16          Browne made this change because of adidas. He did so in good  
17          faith. There is no bad faith. No evidence of bad faith here.

18          Mr. Becker also told you that he tried to follow up  
19          with Ms. Backman. He tried to call her. He wanted to tell her  
20          that they're changing to four bars. He wasn't able to reach  
21          her. He couldn't get in touch with her, but he tried, and that  
22          was his undisputed testimony. She never returned his calls.  
23          They never spoke, but he did try. They acted in good faith at  
24          all times.

25          Robert Childs, again, he told you will about the

N1CQadi3

Summation - Mr. Maldonado

1 designer sweatpants.

2 Now, adidas complains about compression pants. I'm  
3 not sure if they're really complaining about the sweatpants,  
4 although the charge was infringement, but what was in Thom  
5 Browne, the company, what was in their mind when they were  
6 coming out with sweatpants? Mr. Childs told you about that.  
7 He said they wanted to design something that the customers  
8 could wear to work. They could wear on the weekends when  
9 they're lounging. It's just a natural progression of the  
10 development of their line of clothing. That's what the  
11 sweatpants were. They wanted something that the customers  
12 could wear on weekends.

13 And so we see through this period of time -- and again  
14 this goes to Thom Browne's good faith -- you see evidence. You  
15 see lots of images from fashion shows from 2008 through 2018.  
16 I will go through some of these, and you will see throughout  
17 the years, throughout all these years Thom Browne has been  
18 selling items of clothing, including sweaters and casual wear  
19 with four bars and with the Grosgrain signature. You'll see it  
20 throughout this collection.

21 Mr. Henn tried to create some kind of timeline like  
22 Thom Browne just started using Grosgrain in a decorative way or  
23 they're changing the way that they're using their signatures.  
24 Interestingly enough, his timeline doesn't have any dates on  
25 it. So you don't know when any of this actually happened. The

N1CQadi3

Summation - Mr. Maldonado

1 truth is that it all happened a long time ago; that Thom Browne  
2 has been using Grosgrain decoratively in his clothing,  
3 Mr. Childs testified, since the beginning, since he started  
4 there in 2007. It's not something new. It's not some  
5 progression to change the look of Thom Browne's clothing to  
6 look more like adidas. That's not happening.

7 Now, we heard testimony from Ms. Vanderhoff. You  
8 know, we're trying to figure out what was the delay. We had  
9 Ms. Backman testify that she knew about Thom Browne in 2007.  
10 We know she reached out. Then there was nothing until 2018.  
11 What happened in the interim? Ms. Vanderhoff testified she  
12 didn't know about Thom Browne, and yet, we also heard testimony  
13 from her that before she joined adidas, she worked with  
14 Mr. Henn at Kilpatrick. And she worked mostly on adidas  
15 matters. This was back in 2005. She said that she didn't know  
16 about Thom Browne until 2018, but then there was a privilege  
17 log, there was an entry, and you saw the testimony about this,  
18 that in 2006, Ms. Vanderhoff, who back then was known as Sara  
19 Maurer, she sent an email to Charlie Henn. In 2006 she sent an  
20 email to Charlie Henn. What's the subject? Potential claims  
21 against Thom Browne. Ms. Vanderhoff was working on Thom Browne  
22 matters when she was an associate at Kilpatrick in 2006. She  
23 was working on the very matter that was the predecessor to this  
24 lawsuit. Yet, she told you she didn't even know about Thom  
25 Browne until 2018. Ladies and gentlemen, that affects her

N1CQadi3

Summation - Mr. Maldonado

1 credibility, as you consider her testimony and all the matters  
2 that she testified about at this trial.

3 Let's look at this slide. That's one of the images  
4 that adidas loves. They love that image on the right of the  
5 model on the track in her compression wear. Ladies and  
6 gentlemen, it's a stretch to think that this image means that  
7 Thom Browne changed his whole business, everything he's built  
8 over his whole career to look like adidas. That's what they  
9 want you to believe, because of that one image on Facebook.

10 We also saw the Dan Levy video, and you all enjoyed  
11 that, I'm sure. Dan Levy is there in his Thom Browne sweat  
12 suit. He's not stretching. He's not exercising. He's  
13 drinking a milkshake or maybe it's a pina colada, who knows,  
14 but he is certainly not exercising in his Thom Browne clothes.  
15 This whole idea that Thom Browne wants to be a sportswear  
16 athletic company is just not true.

17 Now you saw corporate board meeting minutes that went  
18 on the board talking about sportswear, how they're going to  
19 grow the sportswear business. Yet, keep in mind as the  
20 witnesses testified, as the documents show, what do they mean  
21 by that? Sportswear within the Thom Browne company means  
22 anything that's not tailored. So they're trying to grow the  
23 non-tailored portion of their business: The knits, the polo  
24 shirts, various items Mr. Bazan talked about in his emails.  
25 They weren't talking about performance athletic wear. There

N1CQadi3

Summation - Mr. Maldonado

1 was one email that talked about expanding compression wear into  
2 bags and shoes. You heard testimony that never happened.  
3 There's been no expansion into adidas's realm.

4 So, ladies and gentlemen, that's the last fact that  
5 you need to consider when you're deciding likelihood of  
6 confusion. As you go through all of these factors, you should  
7 come to the conclusion that there is no likelihood of confusion  
8 here. Again, this case isn't about confusion. It isn't about  
9 competition. It's about whether adidas can own all stripes.

10 Now, there's another claim in case for dilution that  
11 the Judge will instruct you about. And one of the questions  
12 that you need to decide is whether the Three-Stripe Mark is  
13 famous. Now, as the Judge will instruct you, you need to  
14 decide the Three-Stripe Mark was famous at the time that Thom  
15 Browne adopted his Grosgrain and at the time that Thom Browne  
16 adopted the four bars. Those are the two signatures that are  
17 accused of infringement here. And you see here on the left,  
18 you've see in this trademark registration. Thom Browne owns  
19 the trademark registration for his Grosgrain, for clothing.  
20 You see that here on the left. It cites a date of first use in  
21 2004. So we know that Thom Browne has been using the Grosgrain  
22 since at least 2004. Adidas has to prove that its Three-Stripe  
23 Mark was famous at least as of 204 with respect to dilution  
24 claim against the Grosgrain. With respect to its dilution  
25 claim against the four bars, adidas has to show that its

N1CQadi3

Summation - Mr. Maldonado

1 Three-Stripe Mark, however that is defined, was famous as of  
2 2008. Those are the critical dates for dilution.

3 What's the evidence? There is none. First of all,  
4 there's no evidence about fame of three horizontal stripes. So  
5 any alleged evidence that adidas will rely on regarding fame  
6 would be as to its trademark registrations perhaps or as to  
7 vertical stripes. You're not going to see any evidence  
8 relating to fame of horizontal stripes. As I told you earlier  
9 and as you saw the evidence, there is very scant evidence that  
10 adidas has even used horizontal stripes.

11 You have here testimony from Tom Kahl, the senior  
12 manager of finance at adidas. He talked about the data that he  
13 considered, the sales data that he considered, or that are  
14 presented in his sales report, rather. He says there was no  
15 sales presented prior to 2012. No sales data prior to 2012.  
16 Dilution has to be as of 2002, 2004 or 2008. They have no  
17 sales data prior to those periods. Because the systems don't  
18 have that data. So the sales data, as you'll see in this  
19 slide, is from 2012 forward. There's no pre-2012 sales data.  
20 No data to support fame for purposes of dilution.

21 Now if we talk about advertising and marketing data.  
22 You'll see here in this slide, if you look at Plaintiff's  
23 Exhibit 72, which they rely upon, it doesn't have any data  
24 prior to 2010. Marketing advertising spends no data prior to  
25 2012. So, again, here, if we use 2012 as the date for



N1CQadi3

Summation - Mr. Maldonado

1 marketing and sales data, that's supposedly is going to show  
2 that the Three-Stripe Mark is famous, nothing prior to 2008.  
3 There is no data that's going to support their claim of  
4 dilution.

5 Catalogs. Adidas has relied on many catalogs, but  
6 catalogs are not evidence of fame. Catalogs are sent to  
7 wholesale buyers. They are not sent to consumers. They're  
8 sent to buyers of stores. They can't rely on catalogs to show  
9 fame.

10 So, ladies and gentlemen, there is no evidence in this  
11 record that the Three-Stripe Mark was famous prior to 2008.  
12 That alone is reason enough for you to deny the dilution claim.

13 Interestingly enough, adidas survey artist, Hal Poret,  
14 he didn't conduct a survey on fame. Survey experts often will  
15 conduct surveys to support claims of dilution. In this case,  
16 there's no survey by Mr. Poret. Mr. Joachimsthaler, who you  
17 heard from, he conducted a survey, but it wasn't a fame survey.  
18 He says it was a recognition survey. We asked him, did you do  
19 a fame survey? He said no. It's definitely not a fame survey.  
20 No survey evidence of fame.

21 Ladies and gentlemen, one of the things you should  
22 think about throughout your evaluation of the testimony and as  
23 you come to your conclusion is how has adidas been harmed by  
24 any of this? And you will see, there is no harm. There's been  
25 no harm. There's no evidence of harm. There's no evidence

N1CQadi3

Summation - Mr. Maldonado

1 that adidas has been harmed by anything that Thom Browne has  
2 done.

3 We talked about confusion. They had their confusion  
4 survey. As we mention, there is initial interest, there is  
5 post sale. We put those around the side there because really  
6 the important thing about confusion is the middle there, the  
7 point of sale. Adidas's evidence misses the mark.

8 Now the only evidence that they tried to put in on  
9 harm is Dr. Joachimsthaler. Now I'm sure you were all  
10 scintillated by his testimony about your brain and the little  
11 nodules in your brain, and you probably didn't know there was a  
12 compartment in your brain where adidas sits. They have all  
13 these theories about the brain and what's going on in the brain  
14 to try to manufacture a theory of harm. But it's all  
15 theoretical. There's no empirical evidence. He didn't do any  
16 studies. He didn't put anything in front of you that shows  
17 adidas was harmed. He just comes up with theoretical  
18 possibilities that he knows as a scholar because he's very  
19 intelligent in these matters, and so he tells you what scholars  
20 think about what's going on in your brain, but no real evidence  
21 of harm. Just think as a practical matter, is adidas being  
22 harmed by Thom Browne? You can even answer that at that level,  
23 ladies and gentlemen.

24 As you know here, he says, he talks about different  
25 lifestyles, and he admits that Thom Browne is luxury. Adidas

N1CQadi3

Summation - Mr. Maldonado

1 is for everyone. He knows about the difference. He knows  
2 they're not competitors. Adidas and Thom Browne don't compete  
3 for the same business.

4 Remember that chart at the bottom there? That  
5 confusing chart with all the circles and the overlapping  
6 circles, and I don't know what that means, but he put that  
7 chart up on the screen and he said this is harm. This shows  
8 harm. The little circles, adidas and Thom Browne, I don't  
9 know, somehow that's harm.

10 Mr. Steckel came up. He is a professor of marketing  
11 at NYU. He testified and told you, he's an expert, he is a  
12 specialized witness, and he told you, my overall conclusion is  
13 that his opinions, Dr. Joachimsthaler's opinions lack  
14 scientific basis. They're not grounded -- they are grounded on  
15 baseless and incorrect assumptions and a lot of speculation.  
16 To put it simply, his report was a lot of complicated  
17 hand-waving as opposed to scientific investigations.

18 No harm here, ladies and gentlemen. No damages.  
19 Adidas is going to ask you to find Thom Browne liable and to  
20 award them, I don't know, 7 million plus dollars in damages?  
21 Ladies and gentlemen, in order to award damages, you need to  
22 find that adidas was harmed. Adidas was not harmed. The  
23 damages, if there is liability, and we don't think that there  
24 is, and we hope that you agree with us -- zero.

25 Ladies and gentlemen, at the conclusion of this case,

N1CQadi3

Summation - Mr. Maldonado

1 and we're just about over. Five minutes left. Can you  
2 imagine? At the conclusion of this case, we're going to take a  
3 break. The Judge will instruct you on the law. Then you are  
4 going to go back to deliberate, and the Judge will hand you  
5 this verdict form. The verdict form will ask you on the claim  
6 of trademark infringement, we, the jury, find the defendant  
7 Thom Browne -- you should check the right box -- not liable for  
8 trademark infringement. If you check that box, you don't have  
9 to answer 2 or 3. You don't have to put in any dollar amounts  
10 in those two questions.

11 Then you skip to the fourth question. Again the  
12 question is: On adidas's claim for trademark dilution, we, the  
13 jury, find the defendant Thom Browne, not liable. And that's  
14 it. And then your work is done. You can go home. You can go  
15 back to your lives, back to your families, back to your jobs.  
16 and we're done.

17 So thank you all for your time, for your patience, for  
18 your attention, and, please, vote as you should: That Thom  
19 Browne is not liable. Thank you.

20 THE COURT: Thank you very much.

21 All right, ladies and gentlemen. We will take our  
22 lunch break now. So we will resume at 1:30.

23 (Jury not present)

24 THE COURT: Please be seated. It's going to sound  
25 like a broken record, but I continue to be very impressed by

N1CQadi3

Summation - Mr. Maldonado

1 the quality of lawyering in this case, and I want to express my  
2 great thanks to all the counsel for their really excellent  
3 work. It's a case that has many interesting facets that now  
4 will be for the jury as soon as I give them instructions of  
5 law.

6 Now I couldn't help but think when we were hearing  
7 about various marks of what undoubtedly are the most famous  
8 marks; namely the Marx brothers. And so my trivia question for  
9 counsel is: How many Marx brothers were there?

10 You're saying four? Can you name them?

11 MR. LEWIN: Harpo, Groucho. I'm forgetting the order  
12 on the last two --

13 THE COURT: My courtroom deputy --

14 DEPUTY CLERK: Chico, Zeppo.

15 THE COURT: Technically, you could make an argument  
16 that there were four. There were actually five. But one of  
17 them named Gummo only appeared on stage and never appeared in  
18 the movies. But you knew that, of course.

19 So, whether it's three stripes, four stripes in the  
20 case of the Marx brothers, it was five strikes. And, by the  
21 way, their stock in trade was confusion. See you in an hour.

22 THE COURT: I'm sorry, are the exhibits all ready?

23 MR. HENN: There's an issue that we just need to put  
24 something on the record at the court reporter's request, but  
25 they are ready.

N1CsADI4

Jury Charge

1 THE COURT: We'll do that once we come back.

2 (Luncheon recess)

3 AFTERNOON SESSION

4 1:30 p.m.

5 (Jury not present)

6 THE COURT: There was something plaintiff's counsel  
7 wanted to put on about exhibits.

8 MR. HENN: Yes, your Honor.

9 In finalizing the exhibits, we realized there was a  
10 handful where there was no objection, it was presented to the  
11 witness and the jury, but your Honor didn't say the magic words  
12 received.

13 THE COURT: But that's because I said it earlier, and  
14 I don't know if you found this, that where the parties had  
15 stipulated, in effect, to the admission, they were  
16 automatically received. So those were received, in fact, even  
17 though I didn't say it at that time.

18 MR. HENN: Thank you.

19 Do you mind if I just read them for clarity sake?

20 THE COURT: Go ahead.

21 MR. HENN: The exhibits referring to, these are all  
22 plaintiff's exhibits, 50, 80, 81, 82, 86, 196, 1008, 1030,  
23 1307, and 1309.

24 (Plaintiff's Exhibits 50, 80, 81, 82, 86, 196, 1008,  
25 1030, 1307, and 1309 received in evidence)

N1CsADI4

## Jury Charge

1 THE COURT: OK. And now so that they can go into the  
2 jury room as soon as we finish with the instructions, where are  
3 the exhibits?

4 They are in those various boxes on both sides?

5 So did you bring the crane?

6 Now we know what needs to be brought in and now the  
7 CSO officer can help with that.

8 Yes.

9 MR. MALDONADO: Your Honor, we want to read a couple  
10 of transcript corrections into the record.

11 THE COURT: Go ahead.

12 MR. MALDONADO: At page 401, line 12, 0820 should be  
13 0082 and 0120 should be 0102. And then at page 401, line 20,  
14 39 should be 139.

15 THE COURT: Very good.

16 MR. MALDONADO: Thank you, your Honor.

17 THE COURT: All right.

18 (Jury present)

19 Ladies and gentlemen, you each have a copy now of my  
20 instructions of law. I'm going to read them together now.  
21 You'll be able to take them with you into the jury room as well  
22 to refer to them during your deliberations.

23 If you look at the table of contents on the second  
24 page, you'll see that first there are some general  
25 instructions. These are instructions that apply basically to

NlCsADI4

## Jury Charge

1 all civil cases.

2 Then there's instructions under the heading liability.  
3 These are about the two claims in this case: Infringement and  
4 dilution.

5 Then if you find liability on infringement, then you  
6 need to determine damages, which is just the lawyer's word for  
7 money, so there is some instructions there in the third section  
8 about that.

9 Finally, there is some concluding instructions about  
10 how you fill out your verdict form and things like that sort.

11 So let's begin on page three with instruction number  
12 one.

13 We are now approaching the most important part of this  
14 case, your deliberations. You have heard all of the evidence  
15 in the case, as well as the final arguments of the lawyers for  
16 the parties. Before you retire to deliberate, it is my duty to  
17 instruct you as to the law that will govern your deliberations.  
18 These are the final and binding instructions, which entirely  
19 replace the preliminary instruction I gave you at the start of  
20 the case, which you should now discard.

21 Regardless of any opinion that you may have as to what  
22 the law may be or ought to be, it is your sworn duty to follow  
23 the law as I give it to you. Also, if any attorney or other  
24 person has stated a legal principle different from any that I  
25 state to you in my instructions, it is my instructions that you



N1CsADI4

## Jury Charge

1 must follow.

2 Because my instructions cover many points, I have  
3 provided each of you with a copy of them, not only so that you  
4 can follow them as I read them to you now, but also so that you  
5 can have them with you for the reference throughout your  
6 deliberations. In listening to them now and reviewing them  
7 later, you should not single out any particular instruction as  
8 alone stating the law, but you should instead consider my  
9 instructions as a whole.

10 Your duty is to decide the fact issues in the case and  
11 arrive, if you can, at a verdict. You, the members of the  
12 jury, are the sole and exclusive judges of the facts. You pass  
13 upon the weight of the evidence; you determine the credibility  
14 of the witnesses; you resolve such conflicts as there may be in  
15 the testimony; and you draw whatever reasonable inferences you  
16 decide to draw from the facts as you determine them.

17 In determining the facts, you must rely upon your own  
18 recollection of the evidence. To aid your recollection, we  
19 will send you the exhibits at the start of your deliberations,  
20 together with an index to help you find what you want. If you  
21 need to review particular items of testimony, we can also  
22 arrange to provide them to you in transcript or read-back form.

23 Please remember that none of what the lawyers have  
24 said in their opening statements, in their closing arguments,  
25 in their objections, or in their questions is evidence. Nor is

N1CsADI4

## Jury Charge

1 anything I may have said evidence. The evidence before you,  
2 consists of just three things: The testimony given by  
3 witnesses that was received in evidence, the exhibits that were  
4 received in evidence, and any stipulations of the parties as to  
5 matters in evidence.

6 Testimony consists of the answers that were given by  
7 the witnesses to the questions that were permitted to be asked  
8 here in court. Please remember that questions, although they  
9 may provide the context for the answers, are not themselves  
10 evidence, only answers are evidence, and you should therefore  
11 disregard any question to which I sustained an objection.  
12 Also, you may not consider any answer that I directed you to  
13 disregard or that I directed be stricken from the record.  
14 Likewise, you may not consider anything you heard about the  
15 contents of any exhibit that was not received in evidence.

16 More generally, you should be careful not to speculate  
17 about matters not in evidence. Your focus should be solely on  
18 the evidence that was presented here in court.

19 It is the duty of the attorney for each side of a case  
20 to object when the other side offers testimony or other  
21 evidence that the attorney believes is not properly admissible.  
22 Counsel also have the right and duty to ask the court to make  
23 rulings of law and to request conferences out of the hearing of  
24 the jury. All such questions of law must be decided by me.  
25 You should not show any prejudice against any attorney or party

N1CsADI4

## Jury Charge

1 because the attorney objected to the admissibility of evidence,  
2 asked for a conference out of the hearing of the jury, or asked  
3 me for a ruling on the law.

4 I also ask you to draw no inference from my rulings or  
5 from the fact that on occasion I asked questions of certain  
6 witnesses. My rulings were no more than applications of the  
7 law and my questions were only intended for clarification or to  
8 expedite matters. You should understand this, I have no  
9 opinion as to the verdict you should render in this case.

10 You are to perform your duty of finding the facts  
11 without bias or prejudice or sympathy or hostility as to any  
12 party, for all parties are equal under the law. You are to  
13 perform your final duty in an attitude of complete fairness and  
14 impartiality. You are not to be swayed by rhetoric or  
15 emotional appeals. It must be clear to you that if you were to  
16 let extraneous considerations interfere with your thinking,  
17 there would be a risk that you would not arrive at a true and  
18 just verdict. So do not be guided by anything except clear  
19 thinking and calm analysis of the evidence.

20 As you know, this is a civil case. In a civil case, a  
21 party who is making a claim against another party has what we  
22 call the burden of proof, which is the burden of establishing  
23 each of the essential elements of that claim. Here, adidas has  
24 asserted claims of trademark infringement and dilution against  
25 Thom Browne, and therefore has the burden of proof as to those

N1CsADI4

## Jury Charge

1 claims.

2 I will describe the essential elements of adidas'  
3 claims shortly, but for now, keep in mind that adidas must  
4 prove each of the essential elements of each of its claims by a  
5 preponderance of the credible evidence. Credible evidence  
6 means such evidence that you find worthy of belief. To  
7 establish an element of a claim by a preponderance of the  
8 credible evidence means to prove that that element is more  
9 likely true than not true.

10 When assessing whether a party has met its burden of  
11 proof or failed to do so, the question is not which party  
12 called the greater number of witnesses or how much time one  
13 party or another spent during the trial. The focus must always  
14 be on the quality of the evidence: Its persuasiveness in  
15 convincing you of its truth.

16 In deciding whether a party meets its burden of proof,  
17 you may consider both direct evidence and circumstantial  
18 evidence.

19 Direct evidence is evidence that proves a fact  
20 directly. For example, where a witness testifies to what he or  
21 she saw, heard, or observed, that is called direct evidence.

22 Circumstantial evidence is evidence that tends to  
23 prove a fact by proof of other facts. To give a simple  
24 example, suppose that when you came into the courthouse today  
25 the sun was shining and it was a nice day, but the courtroom

N1CsADI4

## Jury Charge

1 blinds were drawn and you could not look outside. Later, as  
2 you were sitting here, someone walked in with a dripping wet  
3 umbrella, and soon after somebody else walked in with a  
4 dripping wet raincoat. Now, on our assume facts, you cannot  
5 look outside the courtroom and you cannot see whether it is  
6 raining, so you have no direct evidence of that fact. But on  
7 the combination of the facts about the umbrella and the  
8 raincoat, it would be reasonable for you to infer that it had  
9 begun raining.

10 That is all there is to circumstantial evidence.  
11 Using your reason and experience, you infer from established  
12 facts the existence or nonexistence of some other fact. Please  
13 note, however, that it is not a matter of speculation or guess;  
14 it is a matter of logical inference.

15 The law makes no distinction between direct and  
16 circumstantial evidence. Circumstantial evidence is of no less  
17 value than direct evidence, and you may consider either/or  
18 both, and may give them such weight as you conclude is  
19 warranted.

20 It must be clear to you by now that counsel for the  
21 opposing parties are asking you to draw very different  
22 conclusions about various factual issues in the case. An  
23 important part of that decision will involve making judgments  
24 about the testimony of the witnesses you have listened to and  
25 observed. In making these judgments, you should carefully

N1CsADI4

## Jury Charge

1 scrutinize all of the testimony of each witness, the  
2 circumstances under which each witness testified, and any other  
3 matter in evidence that may help you to decide the truth and  
4 the importance of each witness's testimony.

5 Your decision to believe or to not believe a witness  
6 may depend on how that witness impressed you. How did that  
7 witness appear to you? Was the witness candid, frank, and  
8 forthright, or did the witness seem to be evasive or suspect in  
9 some way? How did the way the witness testified on direct  
10 examination compare with how the witness testified on  
11 cross-examination? Was the witness consistent or  
12 contradictory? Did the witness appear to know what he or she  
13 was talking about? Did the witness strike you as someone who  
14 was trying to report his or her knowledge accurately? These  
15 are examples of the kinds of common-sense questions you should  
16 ask yourselves in deciding whether a witness is or is not  
17 truthful.

18 How much you choose to believe a witness may also be  
19 influenced by the witness's bias. Does the witness have a  
20 relationship with any of the parties that may affect how he or  
21 she testified? Does the witness have some interest, incentive,  
22 loyalty, or motive that might cause him or her to shade the  
23 truth? Does the witness have some bias, prejudice, or  
24 hostility that may cause the witness to give you something  
25 other than a completely accurate account of the facts he or she

N1CsADI4

## Jury Charge

1 testified to?

2 You should also consider whether the witness had an  
3 opportunity to observe the facts he or she testified about, and  
4 whether the witness's recollection of the facts stands up in  
5 light of the other evidence in the case.

6 In other words, what you must try to do in deciding  
7 credibility is to size up a person just as you would in any  
8 important matter where you are trying to decide if a person is  
9 truthful, straightforward, and accurate in his or her  
10 recollection.

11 Some of the testimony before you is in the form of  
12 excerpts from the depositions that were received in evidence.  
13 A deposition is simply a procedure whereby prior to trial the  
14 attorneys may question a witness or a party under oath before a  
15 court stenographer. You should consider the deposition  
16 received for trial according to the same standards you would  
17 use to evaluate the testimony of a witness given live in court.

18 The law permits parties to offer testimony from  
19 witnesses who were not involved in the underlying events in the  
20 case, but who by education or experience profess to expertise  
21 in a specialized area of knowledge. In this case, the expert  
22 witnesses who testified were Hal Poret, Erich Joachimsthaler,  
23 and John Plumpe called by adidas, and Joanne Arbuckle, Joel  
24 Steckel, and Basil Imburgia called by Thom Browne. Specialized  
25 testimony is presented to you on the theory that someone who is

N1CsADI4

## Jury Charge

1 learned in the field may be able to assist you in understanding  
2 specialized aspects of the evidence.

3           However, your role in judging credibility and  
4 assessing weight applies just as much to these witnesses as to  
5 other witnesses. When you consider the specialized opinions  
6 that were received in evidence in this case, you may give them  
7 as much or as little weight as you think they deserve. For  
8 example, a specialized witness necessarily bases his or her  
9 opinions, in part or in whole, on what that witness learned  
10 from others, and you may conclude that the weight given the  
11 witness's opinions may be affected by how accurate or  
12 inaccurate an underlying information is. More generally, if  
13 you find that the opinions of a specialized witness were not  
14 based on sufficient data, education, or experience, or if you  
15 should conclude that the trustworthiness or credibility of such  
16 a witness is questionable, or if the opinion of the witness is  
17 outweighed, in your judgment, by other evidence in the case,  
18 then you may, if you wish, disregard the opinions of that  
19 witness entirely or in part. On the other hand, if you find  
20 that a specialized witness is credible, and that witness's  
21 opinions are based on sufficient data, education, and  
22 experience, and that the other evidence does not give you  
23 reason to doubt the witness's conclusions, you may, if you  
24 wish, rely on that witness's opinions and give them whatever  
25 weight you deem appropriate.



N1CsADI4

## Jury Charge

1           With these general instructions in mind, let me now  
2           turn to the two claims in this case that the plaintiffs, adidas  
3           America Inc., and adidas A.G. (collectively referred to as  
4           adidas) bring against Thom Browne, Inc.: A claim of trademark  
5           infringement and a claim of trademark dilution.

6           I will shortly instruct you on each of the essential  
7           elements that adidas must prove, by a preponderance of the  
8           evidence, to prevail on a given claim. This is known as  
9           establishing liability. If adidas has failed to prove any  
10          essential element of a particular claim by a preponderance of  
11          the evidence, you must find Thom Browne not liable on that  
12          claim. By contrast, if you find that adidas has proven by a  
13          preponderance of the evidence every essential element of a  
14          particular claim, then you should find Thom Browne liable on  
15          that claim.

16          Before we turn to adidas' claims, a word about the  
17          trademark at issue. A trademark can be a word, name, symbol,  
18          or design that indicates to consumers the company associated  
19          with a product. Here, adidas asserts infringement and dilution  
20          of what it calls the Three-Stripe Mark. For purposes of this  
21          case, adidas' Three-Stripe Mark means its use of three parallel  
22          stripes on clothing or shoes in the manner described and  
23          exemplified in a number of federal trademark registrations that  
24          you can review at Plaintiff's Exhibit 181 and 183. It also  
25          includes any other use by adidas of three parallel stripes on

N1CsADI4

## Jury Charge

1 clothing or shoes that you find gives consumers the same  
2 commercial impression as any one or more of the registered  
3 uses. By this, I mean that you may find that a particular use  
4 of three parallel stripes by adidas falls under its  
5 Three-Stripe Mark -- even if it differs in some way from the  
6 use of three stripes in any of the federal registrations -- if  
7 you find that the use would be perceived in the same way by a  
8 reasonable consumer.

9 Adidas asserts that Thom Browne has infringed adidas'  
10 Three-Stripe Mark through Thom Browne's use of two branding  
11 designs called the Four Bar and Grosgrain designs on specific  
12 Thom Browne products. You can review the specific Thom Browne  
13 products that adidas accuses of infringement at Plaintiff's  
14 Exhibits 55 and 56 (collectively referred to as the accused  
15 products).

16 Adidas contends that Thom Browne's use of the Four Bar  
17 and Grosgrain designs on the accused products is likely to  
18 confuse consumers into thinking that the products are made and  
19 sold or otherwise connected with, associated with, sponsored  
20 by, or approved by adidas. As you heard, adidas does not  
21 contend that this confusion occurs at the point-of-sale of Thom  
22 Browne products, but rather either presale (such as when  
23 consumers first see a product in stores, online, or on social  
24 media), or post-sale (as when consumers other than the Thom  
25 Browne customers see these customers wearing the accused

N1CsADI4

Jury Charge

1 products).

2 In determining whether consumers, at either of these  
3 points in time, are likely to be confused, you may draw on your  
4 own common experience. You should also take into consideration  
5 the following factors:

6 First, the strength of adidas' Three-Stripe Mark. A  
7 mark's strength is measured by its tendency to identify the  
8 products sold under the mark as associated with a particular  
9 company and may depend on factors, such as advertising, media  
10 coverage of products bearing the mark, sales success, the  
11 longevity and exclusivity of the mark's use, consumer studies  
12 linking the mark to the company, and any other factor in  
13 evidence that you find bears on the strength of the mark. The  
14 stronger the mark, the more likely that similar uses by other  
15 parties will cause confusion.

16 Second, the degree of similarity between adidas'  
17 Three-Stripe Mark and Thom Browne's use of the Four Bar and/or  
18 Grosgrain designs on the accused products. In particular, you  
19 should consider what effect the similarity or lack thereof has  
20 on consumers and whether any similarity between the parties'  
21 designs is likely to cause confusion among consumers.

22 Third, whether the accused products and adidas  
23 products compete for the same consumers.

24 Fourth, whether or not there is evidence that  
25 consumers are actually confused about which company offers the

N1CsADI4

## Jury Charge

1 accused products. While proof of actual confusion is not  
2 necessary to prove trademark infringement, and it is enough for  
3 plaintiffs to show likelihood of confusion, evidence of actual  
4 confusion can weigh in favor of there being a likelihood of  
5 confusion. Conversely, the absence of evidence of actual  
6 confusion can be evidence that confusion is unlikely. Please  
7 remember that adidas is only claiming confusion at the pre-sale  
8 and post-sale points, and that its survey is limited to  
9 post-sale.

10 Fifth, the quality of the accused products relative to  
11 adidas' products bearing the Three-Stripe Mark. If the  
12 products are of similar quality, confusion may be more likely,  
13 whereas if they are different quality, confusion is less  
14 likely.

15 Sixth, the degree of care and attention that an  
16 ordinary consumer would use when encountering adidas' and Thom  
17 Browne's respective products. Generally, the more  
18 sophisticated and careful the average consumer of a product is,  
19 the less likely that that consumer will be confused about the  
20 company behind the product.

21 Seventh, whether adidas has shown that Thom Browne  
22 acted in bad faith. In this context, bad faith goes to whether  
23 Thom Browne used the Four Bar and Grosgrain designs on the  
24 accused products within with the intention that consumers would  
25 associate their products with adidas' Three-Stripe Mark so as

NlCsADI4

Jury Charge

1 to profit from adidas' reputation, or whether Thom Browne chose  
2 to purposely turn a blind eye to the high likelihood that  
3 consumers would be confused.

4 In considering the factors I just described to you,  
5 please keep in mind that no one factor or consideration is  
6 conclusive, but each of these factors, as well as any other  
7 factors you find relevant, should be weighed in light of the  
8 total evidence presented at the trial to determine whether, on  
9 balance, a likelihood of confusion exists. If adidas has  
10 proved that a likelihood of confusion exists, it has then  
11 carried its burden of proof on its infringement claim.

12 Adidas also asserts a claim for trademark dilution  
13 under federal law. This claim does not require showing that  
14 consumers are likely to be confused about the source of the  
15 accused products. Instead, they require showing that Thom  
16 Browne's designs on the accused products are likely to dilute  
17 the distinctiveness of adidas' Three-Stripe Mark by eroding its  
18 distinctiveness in the mind of the public.

19 To prove dilution under federal law, adidas must show  
20 by a preponderance of the credible evidence that:

21 One, adidas' Three-Stripe Mark is famous;

22 Two, adidas' Three-Stripe Mark became famous before  
23 Thom Browne first sold any of the accused products; and

24 Three, Thom Browne's use of its Four Bar and Grosgrain  
25 designs on the accused products is likely to dilute the

N1CsADI4

## Jury Charge

1 distinctiveness of adidas' mark.

2           The Three-Stripe Mark is famous if it is widely  
3 recognized by the general consuming public as designating  
4 adidas as the source of goods bearing the mark. In measuring  
5 fame, you may consider your own experience, as well as the  
6 extent, history, and geographic reach of advertising and  
7 publicity of the mark (both by adidas or third parties), the  
8 amount, volume, and geographic reach of sales of products  
9 bearing the mark, the extent to which members of the public  
10 actually recognize the mark, and whether the mark was federally  
11 registered. Here, as described above, the Three-Stripe Mark  
12 consists of several specific federal registrations that you can  
13 review at Plaintiff's Exhibits 181 and 183, as well as any uses  
14 you find to create the same commercial impression.

15           If you determine adidas' Three-Stripe Mark is famous  
16 and has been famous since before Thom Browne began selling the  
17 accused products, you must consider whether Thom Browne's use  
18 of the Four Bar and Grosgrain designs on the accused products  
19 is likely to dilute the distinctiveness of the Three-Stripe  
20 Mark. In determining whether such dilution is likely to occur,  
21 you may consider all relevant factors, including, for example:

22           The degree to which Thom Browne's use of the Four Bar  
23 and/or Grosgrain designs on the accused products is similar to  
24 adidas' use of the Three-Stripe Mark;

25           The strength of adidas' Three-Stripe Mark, which you

N1CsADI4

## Jury Charge

1 should evaluate as described in Instruction 11;

2 The degree to which adidas' Three-Stripe Mark is  
3 widely recognized;

4 Whether Thom Browne intended to create an association  
5 with adidas' Three-Stripe Mark;

6 The extent to which other producers of similar goods  
7 are using three stripes;

8 Any actual association by consumers of Thom Browne's  
9 Four Bar and/or Grosgrain designs with adidas' Three-Stripe  
10 Mark.

11 You may also consider any other relevant factors, and  
12 you should remember that no one of these factors is conclusive.  
13 Your task is to consider whether, after considering these  
14 factors and any others that you find relevant, Thom Browne's  
15 use of its Four Bar and/or Grosgrain designs on the accused  
16 products is more likely than not to dilute the distinctiveness  
17 of adidas' Three-Stripe Mark.

18 If you find Thom Browne liable for trademark  
19 infringement, you must also determine the amount of money to  
20 award to adidas. There are two possible components of such an  
21 award:

22 One, any actual damages suffered by adidas, and

23 Two, the profits Thom Browne earned by selling any of  
24 the accused products you determine infringed adidas'  
25 Three-Stripe Mark.

N1CsADI4

## Jury Charge

1           Please note that this does not apply to dilution  
2           (where no monetary damages are claimed), but only to  
3           infringement.

4           Actual damages means the amount of money necessary to  
5           compensate adidas for harm directly caused by any infringement  
6           by Thom Browne. You may decline to award any actual damages if  
7           you find adidas was not harmed by any infringement by Thom  
8           Browne.

9           Adidas does not claim that it lost sales as a result  
10          of any infringement by Thom Browne; rather, it contends that if  
11          Thom Browne had wanted to use its designs without infringing on  
12          adidas' Three-Stripe Mark, it would have had to enter into a  
13          licensing agreement with adidas. Accordingly, adidas contends  
14          that its actual damages are measured by the royalties that  
15          Thom Browne would have paid to adidas under such a licensing  
16          agreement. The parties are agreed that you should calculate  
17          such damages using a royalty fee equal to 8 percent of  
18          wholesale sales and 3.1 percent of retail and e-commerce sales  
19          of any of the accused products you find have infringed adidas'  
20          Three-Stripe Mark.

21          If you find Thom Browne liable for trademark  
22          infringement, you may also award adidas the profits you  
23          determine Thom Browne earned as a result of its infringement.  
24          You should measure such profits as the difference between Thom  
25          Browne's total sales of any accused products you determine to



N1CsADI4

## Jury Charge

1 have infringed adidas' Three-Stripe Mark and the expenses  
2 Thom Browne incurred in order to make those sales. The burden  
3 is on adidas to show by the preponderance of the credible  
4 evidence the amount Thom Browne received from selling the  
5 accused products, while the burden is on Thom Browne to show by  
6 the preponderance of the credible evidence the expenses it  
7 incurred in order to sell the accused products.

8 You will shortly retire to the jury room to begin your  
9 deliberations. As soon as you get to the jury room, please  
10 select one of your number as the foreperson to preside over  
11 your deliberations and to serve as your spokesperson if you  
12 need to communicate with the court.

13 You will be bringing with you into the jury room a  
14 copy of my instructions of law and a verdict form on which to  
15 record your verdict.

16 Let me pause just there and show you the verdict form.  
17 You saw this during closing arguments with counsel. Let me  
18 show you again. It's a simple one-page document. The first  
19 question is whether on infringement you find Thom Browne liable  
20 or not liable. If you find not liable, then you skip down to  
21 question four. If you find liable, you answer two and three,  
22 which are the amount of damages -- both actual damages and  
23 profits, the two components of damages -- putting the amount  
24 there. And then you go on to the final question, question  
25 four, which is whether you find Thom Browne liable or not

N1CsADI4

Jury Charge

1     liable for dilution.

2             After you have reached your verdict and your  
3     foreperson has signed and dated the verdict form, the  
4     foreperson will fold it and seal it in this envelope very  
5     cleverly marked verdict, and that will be brought to me here in  
6     court. And I will not open it until all eight of you are back  
7     here in the courtroom, and then we will open it and we will ask  
8     each of you individually, after reading the verdict, whether  
9     that is, in fact, your verdict. The reason we go through that  
10    is to be absolutely sure we have your verdict as you have  
11    decided.

12            So back to the instructions.

13            In addition, we will send into the jury room all of  
14    the documentary and physical exhibits that were admitted into  
15    evidence, along with an index so you can locate what you want.  
16    If you want any of the testimony, that can also be provided in  
17    either transcript or read-back form. But please remember that  
18    it is not always easy to locate what you might want, so be as  
19    specific as you possibly can be in requesting portions of  
20    testimony. Also, if you want any of the videotapes replayed,  
21    please let us know, and we will bring you back into court to  
22    see the relevant videotape.

23            Any of your questions, in fact any communication with  
24    the court, should be made to me in writing, signed by your  
25    foreperson, and given to the marshal, who will be available

N1CsADI4

## Jury Charge

1 outside the jury room throughout your deliberations. After  
2 consulting with counsel, I will respond to any question or  
3 request you have as promptly as possible, either in writing or  
4 by having you return to the courtroom so that I can speak with  
5 you in person.

6 You should not however tell me or anyone else how the  
7 jury stands on any issue until you have reached your verdict  
8 and recorded it on the verdict form.

9 Each of you must decide the case for yourself, after  
10 consideration with your fellow jurors of the evidence in the  
11 case, and your verdict must be unanimous. In deliberating,  
12 bearing in mind that while each juror is entitled to his or her  
13 opinion, you should exchange views with your fellow jurors.  
14 That is the very purpose of jury deliberation -- to discuss and  
15 consider the evidence, to listen to the arguments of fellow  
16 jurors, to present your individual views, and to consult with  
17 one other and reach a verdict based solely and wholly on the  
18 evidence.

19 If after carefully listening and after carefully  
20 considering all the evidence and the arguments of your fellow  
21 jurors, you entertain a conscientious view that differs from  
22 the others, you are not to yield your view simply because you  
23 are outnumbered. On the other hand, you should not hesitate to  
24 change or modify an earlier view that, after discussions with  
25 your fellow jurors, now appears to you erroneous.

NlCsADI4

Jury Charge

1 In short, your verdict must reflect your individual  
2 views and it must also be unanimous.

3 This completes my instructions on the law.

4 Now, all previous objections to the instructions are  
5 deemed to have been made again at this time and are preserved.

6 Is there any reason counsel needs to approach the  
7 sidebar?

8 MR. HENN: No, your Honor.

9 MR. MALDONADO: Yes, your Honor.

10 May we approach?

11 THE COURT: OK.

12 (At the sidebar)

13 MR. MALDONADO: I just wanted to put my early  
14 objection on the record, I didn't say what it was. I want it  
15 to be on the record to the verdict form.

16 THE COURT: What's your objection?

17 MR. MALDONADO: My objection was that the defendant  
18 believes that the verdict form should include separate verdict  
19 questions as to each of the accused products.

20 THE COURT: OK. That objection is overruled.

21 MR. MALDONADO: Thank you.

22 (In open court)

23 THE COURT: Ladies and gentlemen, we're going to swear  
24 in the marshal who will guard you throughout your  
25 deliberations.

N1CsADI4

## Jury Charge

1 If you haven't reached a verdict by 4:30, unless you  
2 want to stay later, you should just go home and come back at  
3 9:30 tomorrow, and your foreperson will be in charge that you  
4 don't start your deliberations again until all eight of you are  
5 back.

6 If you decide you want to stay later, you need to let  
7 us know by four o'clock today, a half hour before 4:30, and we  
8 can arrange for you to stay as late at seven o'clock, if you  
9 wish.

10 I remind you that there is no magic to how long you  
11 need to take. You can take five minutes for your verdict. You  
12 can take five days for your verdict. But it all is up to you.

13 So we will swear in the marshal.

14 (Marshal sworn)

15 THE DEPUTY CLERK: Jurors, please follow the marshal  
16 back into our jury room.

17 (Jury not present)

18 THE COURT: As soon as you can, my courtroom deputy  
19 will take the exhibits into the jury room. She hasn't done any  
20 other weightlifting today, so this will be a good opportunity.

21 In terms of counsel. While the jury is deliberating,  
22 there always has to be at least one counsel from each side  
23 present on this floor. You don't have to be in this room, but  
24 you have to be on the 14th floor, and someone who can answer  
25 any notes we receive. So that if we get a note, we can

NlCsADI6

1 promptly respond, we don't have to go searching for counsel  
2 somewhere else.

3 Unless they ask to stay later, you can just  
4 automatically leave at 4:30 and come back at 9:30 tomorrow. I  
5 will let them know tomorrow, if they are still deliberating,  
6 that you can take lunch from one to two, but otherwise you need  
7 to be on this floor.

8 Anything else any counsel needs to raise with the  
9 court?

10 MR. HENN: Not from the plaintiffs.

11 MR. MALDONADO: Nothing, your Honor.

12 Do you have other matters this afternoon?

13 Do you need us to clear out of the courtroom?

14 THE COURT: Pardon?

15 MR. MALDONADO: Do you have other matters?

16 Do you need us to clear out of the courtroom?

17 THE COURT: I have something. I don't think it's four  
18 o'clock. Let me just check.

19 It's not until 4:30, so you can stay here. You can  
20 admire the now no longer existing rack, or you can consider, as  
21 my law clerk did, who is the sixth Marx Brothers, and the  
22 answer was Karl Marx.

23 See you shortly.

24 (Recess pending verdict)

25 (Jury not present)

N1CsADI6

1 THE COURT: We have a verdict.

2 Let's bring in the jury.

3 THE DEPUTY CLERK: Marshal, please bring in the jury.

4 (Jury present).

5 Would the foreperson please rise?

6 THE COURT: I'm sorry. Everyone can be seated first.

7 Actually, you can be seated, too, because when I open  
8 the verdict form in a minute, I will not comment on it because  
9 the determination of the verdict is your job, not mine.

10 But I did want to take a moment, before I open it, to  
11 compliment this jury. I thought you were a terrific jury. I  
12 saw you very carefully observing the witnesses, taking notes.  
13 I have another trademark case beginning January 30. If you  
14 wouldn't mind ...

15 Anyway, in all seriousness, you are now excused for  
16 four years for your service.

17 OK. Now the foreperson will rise and I will open the  
18 verdict.

19 All right. The verdict is in proper form.

20 Mr. Foreperson, on adidas' claim for trademark  
21 infringement, does the jury find the defendant Thom Browne;  
22 liable or not liable?

23 THE JURY: Not liable.

24 THE COURT: On adidas' claim for trademark dilution,  
25 does the jury find the defendant Thom Browne; liable or not

NlCsADI6

1     liable?

2             THE JURY:   Not liable.

3             THE COURT:   Very good.   Please hand it back.

4             Excuse me.   I don't want any talking.

5             Please hand the verdict form to my courtroom deputy.

6             So, Juror No. 1, is that your verdict?

7             JUROR NO. 1:   Yes.

8             THE COURT:   Juror No. 2, is that your verdict?

9             JUROR NO. 2:   Yes.

10            THE COURT:   Juror No. 3, is that your verdict?

11            JUROR NO. 3:   Yes.

12            THE COURT:   Juror No. 4, is that your verdict?

13            JUROR NO. 4:   Yes.

14            THE COURT:   Juror No. 5, is that your verdict?

15            JUROR NO. 5:   Yes.

16            THE COURT:   Juror No. 6, is that your verdict?

17            JUROR NO. 6:   Yes.

18            THE COURT:   Juror No. 7, is that your verdict?

19            JUROR NO. 7:   Yes.

20            THE COURT:   Juror No. 8, is that your verdict?

21            JUROR NO. 8:   Yes.

22            THE COURT:   Juror No. 9, is that your verdict?

23            JUROR NO. 9:   Yes.

24            THE COURT:   Juror No. 10, is that your verdict?

25            JUROR NO. 10:   Yes.



N1CsADI6

1 THE COURT: Juror No. 11, is that your verdict?

2 JUROR NO. 11: Yes.

3 THE COURT: Juror No. 12, is that your verdict?

4 JUROR NO. 12: Yes.

5 THE COURT: Juror polled. Jury unanimous.

6 Again, thank you so much for your excellent jury  
7 service, and you are now excused.

8 Have a good weekend.

9 (Jury discharged)

10 All right. So this also obviates the need for the  
11 court to deal with the issue of laches. The judgment will be  
12 entered probably tomorrow.

13 Anything else we need to take up at this time?

14 Anything from plaintiff?

15 MR. FLEMMING: I don't believe so, your Honor.

16 THE COURT: Anything from defendant?

17 MR. MALDONADO: No, your Honor.

18 THE COURT: Very good. Thanks very much.

19 That concludes this proceeding.

20 (Adjourned)

21

22

23

24

25